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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 813

WILLIAM R. SKIDMORE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OPINION IN CASE AT BAR AND IN RELATED CASE APPENDED.

WM. SCOTT STEWART,
Counsel for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. .....

WILLIAM R. SKIDMORE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of William R. Skidmore, by Wm. Scott Stewart, his counsel, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Federal Grand Juries in and for the Northern District of Illinois investigated the gambling conditions in Chicago and Cook County, Illinois, ostensibly for the purpose of ascertaining whether or not the gamblers attempted to evade paying their full income taxes on the proceeds derived from gambling. Two trials were had resulting in convictions for most of the defendants, including your petitioner (R. 436). Two cases were appealed to the Circuit Court of Appeals for the Seventh Circuit. One resulted in a reversal, but that involving your petitioner was affirmed (R. 497). Your petitioner is on bail, the Circuit

Court of Appeals having granted a stay of mandate (R. 501).

The companion, or related case, which was reversed, is commonly referred to as the *Johnson* case (*United States* v. *Johnson,* 123 F.^{2} 111). We respectfully append the opinion in that case (herein p. 90) as well as in the case at bar (herein p. 78). In order to appreciate our respectful complaints it will be necessary that your Honors glance at the background of these cases, as shown by the record.

The honorable Circuit Court of Appeals said in the *Johnson* case (herein p. 104):

> "Johnson admittedly was a professional gambler and had been for many years. If he had any other business of consequence, the record does not disclose it. He was not just an ordinary gambler, but one of towering stature among that fraternity. The co-defendants were also admittedly in the same business. They operated brazenly and notoriously, and, so far as this record discloses, without interference or restraint during the period covered by the indictment. That the field was a fertile one is evidenced by the huge sums of money which apparently passed through their hands."

The Circuit Court of Appeals said of your petitioner that (herein p. 82):

> "he sold 'protection' to those who desired to engage in the 'handbook' business."

The honorable Circuit Court of Appeals does not explain how your petitioner could possibly have sold protection to anyone, nor can the record support any such assertion. Your petitioner held no official position. The prosecutor tried the case on the theory that your petitioner collected money from gamblers with which to bribe public officials (R. 370). We respectfully submit that the sig-

nificance of this distinction will become apparent upon examination of the record.

The Solicitor General has petitioned your Honors for certiorari in the *Johnson* cases (Nos. 799 and 800). We respectfully refer your Honors to the record in the *Johnson* cases in support of our contention that the honorable Circuit Court of Appeals has arrived at two opposite conclusions upon the same state of facts. If your Honors decide to allow the Government to be heard, we respectfully submit that your Honors will desire to take jurisdiction of the entire subject matter, which naturally includes the case at bar.

The indictment (No. 32125) in the case at bar was filed February 29, 1940 (R. 27). That in the *Johnson* case was filed May 29, 1940. In the *Johnson* case, as appears from the opinion appended, the honorable Circuit Court of Appeals held that the grand jury was without jurisdiction and that the trial court erred in striking the pleas in abatement. In the case at bar, the Circuit Court of Appeals held that the trial court committed no error in striking the same pleas.

We respectfully submit that we would have a right to make this respectful petition to your Honors in hope of success if there had never been a *Johnson* case, for we present errors which were not claimed in the *Johnson* case. As to those errors which were the same in both cases, we respectfully submit that your petitioner has the right to uniformity of decision, and that right having been denied him, your petitioner respectfully makes this application with the difference of opinion in the Circuit Court of Appeals as but one of his grounds. The honorable Circuit Court of Appeals held that the indictment was void as to Johnson because of the illegality of the grand jury, and then turned around and held upon the same record

that an indictment by the same grand jury was valid as to your petitioner.

In any discussion of the merits of the point, sight must not be lost of the fact that the trial court refused to look into the matter, and the Circuit Court of Appeals refused to remedy this neglect.

As appears from the record (R. 5), your petitioner was indicted (in No. 31770) in an indictment filed September 1, 1939 (July Term), which indictment recites that the Grand Jury is of the June 1939 Term:

> "and having continued to sit by order of this Court in and for said Division and District under the July Term of said Court for the purpose of finishing investigations begun but not finished during said June Term of Court, pursuant to request of the United States Attorney and upon motion of the Grand Jury, and inquiring for said Division and District at the July Term of said Court in the year 1939."

The order extending this Grand Jury by Judge Wilkerson appears in the record (R. 3). In the Northern District of Illinois the terms of Court are as follows (herein p. 91):

> "The Terms for the District Court of the Eastern Division of the Northern District of Illinois are fixed by Statute (28 U. S. C. A., Sec. 152), to be held on the first Mondays in February, March, April, May, June, July, September, October and November, and the third Monday in December."

A subsequent indictment (No. 32125) (R. 27) was returned and filed February 29, 1940, by the same grand jury held by the honorable Circuit Court of Appeals to have no legal existence as far as the *Johnson* indictment was concerned. Indictments No. 31770 and No. 32125 were consolidated and the guilty verdicts against your petitioner are based upon both of said indictments. Indictment No. 32125 recites that (R. 27):

> "The Grand Jurors for the United States of

America, duly empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois at the December Term of said Court in the year 1939, having begun but not finished during said December Term of Court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court in and for said Division and District during the February Term of said Court for the purpose of finishing investigations begun but not finished during said December Term of Court, pursuant to request of the United States Attorney and upon motion of the Grand Jury, and inquiring for said Division and District at the February Term of said Court in the year 1940, upon their oaths do present and charge that:"

This allegation in the indictment is not fully in accordance with the facts, as the grand jury had secured a second order of extension (R. 26).

The orders entered by Judge Woodward, continuing the grand jury which returned indictment No. 32125, are shown in the record. (R. 25, 26).

Your petitioner on May 9, 1940, filed his special Plea (R. 32). These Pleas were stricken by the trial court on motion of the United States Attorney (R. 34). The Government offered no evidence at the trial that the grand juries were extended. The trial court overruled a motion for a directed verdict (R. 434, 435), as well as a motion in arrest of judgment (R. 437). Your petitioner respectfully represents that these errors were fatal to the judgment.

The honorable Circuit Court of Appeals disposed of the matter in the case at bar (herein p. 79) as follows:

"The District Attorney moved to strike each plea in abatement, or motion to quash, for the reasons that neither contained sufficient allegations of fact to support the motions, but on the other hand each contained mere conclusions of appellant with no supporting allegations of fact, and was merely an attempt to

contradict the record in each case, and for the further reason that each plea failed to state the source of information upon which appellant's assertions were founded. The court sustained these motions and struck the pleas."

The opinion in the *Johnson* case (herein p. 94) shows the following:

> "The Government had an opportunity to answer the allegations of the motion to quash, but instead, entered a motion to strike, which was allowed. By such motion a legal question was presented which must be determined from the averments of the motion to quash.
>
> * * * * *
>
> "We are not unmindful of the rule invoked by the Government that pleas in abatement and those of a kindred nature must be strictly construed. Facts must be stated, not conclusions. Here, however, the allegations were direct and positive. It is difficult to see how they could have been more specific. The challenge went to the very heart of the authority of the Grand Jury to act. The Government's motion to strike should have been overruled and the Government required to answer. The defendants were entitled to an opportunity to offer evidence in support of the motion and plea. *Carter* v. *Texas*, 177 U. S. 442, 447."

In the *Johnson* case the Circuit Court of Appeals (herein p. 100) held that failure to prove the allegation in the indictment (that the grand jury was extended) was fatal to the conviction. There was a like failure in the case at bar. A decision one way in one case and an opposite holding in a companion case (without any attempt at explanation) must, we respectfully submit, be regarded here as untenable.

In the *Johnson* case the Circuit Court of Appeals said (herein p. 100):

> "If the allegation was essential, as we think it was, it would seem equally essential to support it with proof. Failure to have proved venue, no doubt, would

have been fatal to the judgment. We think failure to prove the allegation with reference to the authority of the Grand Jury to act is likewise fatal. This is especially true in the instant case where the Government relied upon it in order to escape facing the issue tendered by the motion to quash.

"The position of the Government leads to the inevitable result that a Grand Jury may, with impunity, exceed the limitation which Congress has definitely and plainly placed upon its authority, to act at a succeeding term. Furthermore, its unauthorized acts are not subject to challenge and the Government can never be called upon to make proof that the Grand Jury has proceeded in compliance with law. When confronted with a motion to quash or plea in abatement, it relies upon an allegation of the indictment. When the latter is placed in issue by the defendant's plea, it offers no proof in support of the allegation, and the only excuse for its failure to do so is that the court takes judicial notice. There may be room for contrariety of opinion as to the precise manner in which the authority of a Grand Jury should be challenged, but we doubt if any will contend that the Government can wholly evade the challenge as has been done in the instant case. Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment."

In the case at bar, the Circuit Court of Appeals did not discuss this point but merely made the general finding that there was no error in striking the pleas, in overruling the motion to quash and in the judgment. The honorable Circuit Court of Appeals said further in the *Johnson* case (herein p. 98):

"Finally the Government relies upon Section 556, Title 18, U. S. C. A., which provides in substance that no indictment, trial, judgment or other proceeding shall '* * * be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' This provision is not applicable—the question presented is one of substance and not of form. *Crain* v. *United States,* 162 U. S. 625, 644."

In the case at bar the first indictment (No. 31770, R. 5) was returned by the June, 1939, grand jury on September 1, 1939. If the reasoning and law announced in the *Johnson* case be applied to the case at bar, this grand jury was without jurisdiction, as the order of extension (R. 3) authorized the grand jury to sit through July.

Your Honors will perceive from the record (R. 45) that your petitioner alleged in his plea, which plea was stricken (R. 47), that the December, 1939, grand jury had no legal existence because the investigation was not commenced during the regular December, 1939, term. This was a positive sworn statement (R. 45). We shall respectfully follow the method adopted by Mr. Justice Evans (herein p. 115) to better explain the situation. We respectfully add the case at bar to the outline sketched by Mr. Justice Evans in his dissent in the *Johnson* case.

> December, 1939. The grand jury was impaneled. (This is the grand jury which returned the Johnson indictment and also returned the Skidmore indictment (No. 32125).)
>
> January 24, 1940. The first order extending the term of the grand jury. (This is a valid order according to the Circuit Court of Appeals.)
>
> February 28, 1940. The second order extending the term of the grand jury. (This order is void and the grand jury became illegal according to the majority opinion of the Circuit Court of Appeals.)
>
> February 29, 1940. The indictment in the case at bar (No. 32125) was returned.
>
> March 1, 1940. The indictment No. 32127 against Johnson was returned (February Term). (Not convicted on this.)
>
> March 29, 1940. The instant indictment against Johnson returned during March Term. (Held void in the majority opinion in the *Johnson* case.)

Now your Honors will perceive that the difference between the first order of extension (R. 25) and the second

order of extension (R. 26) is that the latter (as held by the majority opinion) attempted to give the jury power to return indictments in which investigation had begun in the February Term. If the grand jury did not in fact start the investigation of your petitioner in the February, 1940, term as alleged in the plea, we respectfully submit that said grand jury would not have applied for the second order before returning the indictment in the case at bar. We respectfully submit that if the investigation had in fact been commenced in December, 1939, the grand jury would have returned the indictment in the case at bar before making application for a new order of extension. As Mr. Justice Evans said (herein p. 115):

> "The first order of extension, made January 24, 1940, authorized the grand jury to sit during the February, 1940 term of court to *finish* investigations begun but not finished at the December, 1939 Term. *We should presume they did what they were ordered to do.*"

We respectfully submit that at least your petitioner was entitled to have the matter inquired into, as was held in the *Johnson* case. Your Honors will please note that Mr. Justice Evans said (herein p. 113):

> "This assignment raises a most important question."

But we respectfully submit that we should not be compelled to try to guess from the record when the investigation commenced against your petitioner. Disregarding the *Johnson* case entirely, the plain fact, as shown by the record, is that your petitioner represented under oath, in a proper manner, in apt time, that in fact the investigation was not commenced in time to give the grand jury jurisdiction. All your petitioner requested was a hearing, which hearing was denied him for no reason except that the prosecutor desired to avoid a hearing upon the merits. The honorable Circuit Court of Appeals has refused to correct this plain error.

In the case at bar we presented to the trial court a fatal defect in the organization of the grand jury, which was not claimed in the *Johnson* case, namely, that the grand juries were hand picked and packed against your petitioner. This same charge was made as to the trial panel.

Your petitioner was not afforded a preliminary hearing. When the various grand juries were empaneled your petitioner was not in custody or on bail, so your petitioner was not obliged to attack the manner of organizing the grand jury until after the indictments were filed. Upon the opening of the *Johnson* trial, your petitioner was dismissed from that case as a defendant (R. 55).

Your petitioner, by leave of the trial court, moved to quash the indictments in the case at bar and challenged the array of the trial panel for reasons fully set up by way of affidavits (R. 52 to 94).

Your petitioner respectfully represented to the trial court that all grand juries and petit juries in the Federal Courts in Chicago, including those on this case, were improperly and illegally drawn and impanelled. Those persons residing outside of the City of Chicago were favored and selected in preference to those living in Chicago. Those who follow the trades, and ordinary working people and their women folk were discriminated against, and an effort was deliberately made by those in charge to obtain as jurors persons calculated to favor the prosecution. Those in charge unlawfully, intentionally and systematically excluded qualified voters from among persons summoned and listed for jury service on both grand and petit juries solely because those excluded might, by reason of their place of residence, occupation and station in life, be open and fair minded concerning the rights of defendants, and those in charge unlawfully discriminated in favor of prospective jurors who might favor the cause of the prosecution. Such discrimination was known by those in charge to be illegal,

and therefore any inquiries made by your petitioner, or by those working in his behalf, were refused answer on the ground that much of the proceeding was not open to the public. The jurors were not drawn by lot or by chance.

Your petitioner further respectfully represented to the trial court that the irregularities as to the selection of juries, upon their face, are not only such that prejudice should be presumed, but your petitioner feared actual prejudice for the following reasons, among others.

The subject of gambling had been made a political football for years in Chicago. The newspapers had sought to discredit those in favor and in power from time to time with stories about gambling. A feud existed between the city authorities and the State's Attorney, resulting in ax raids. In order to discredit the administration, your petitioner had been named as one who collects and pays bribes. Your petitioner alleged that these charges were repeated deliberately on the eve of this trial in order to prejudice your petitioner in his right to a fair jury. Your petitioner represented to the trial court that persons drawn from Chicago in the ordinary walks of life were more apt to understand the methods employed by the newspapers, were more apt to know that many false charges were so made for political purposes than were those people living in remote parts of the district.

Your petitioner informed the trial court that the prosecution expected to rely largely upon circumstantial evidence, and that the question as to whether the city administration was corrupt or whether gambling was illegally permitted was not an issue in the case; that such questions might arise collaterally; that your petitioner feared that cautionary instructions would not be sufficient to insure a fair trial unless precaution was taken to secure a jury properly chosen according to the law of the land.

Your petitioner represented further that if any jurymen

were prejudiced by newspapers, as those illegally drawn from remote areas and from a class of persons holding animosity to your petitioner were likely to be, your petitioner could not secure a fair trial. And if the entire panel were loaded down with such persons, your petitioner would not be protected by challenges, either cause or peremptory.

Your petitioner respectfully requested that the honorable trial court hear witnesses on the manner in which the various juries had been selected, the nature of the newspaper articles and all of the circumstances surrounding the panel of jurors then awaiting service on the trial panel.

In order to show the trial court from the records that this illegal practice had become a common practice, your petitioner showed, by affidavit, the population of Chicago and the County of Cook, as compared with the outlying district. Roughly, the big city and its county have 86% of the population (R. 59) but the outlying territory furnishes 86% of the jurors, grand and petit. Among the records examined was that of the *Glasser* case (R. 70). (In which this Honorable Court allowed a petition for certiorari. No. 798, October Term, 1940.)

Your petitioner, through his counsel (R. 80), informed the trial court that your petitioner had been denied a jury list and access to the papers of those in charge, including questionnaires on file. We respectfully quote from the record (R. 81):

> "Mr. Stewart: All we are asking the Court to do is to ascertain the facts, and if the facts are that these jurors are selected in such a manner that it is not by lot, why, that can be a grave danger to the liberty of any defendant, and it can also work out the other way.
>
> "If a jury commissioner or a marshal or a sheriff is permitted to go out and just pick jurors that he thinks he wants in that particular case, why, they can control the result.
>
> "So the motion here now is that your Honor follow

up this charge that is made by examining into the question of the composition of this panel and the manner in which it is selected."

The trial court informed the United States attorney that the court did not care to hear anything upon the matter of grand juries but that (R. 82):

"The Court: I would like to hear from you concerning this (the trial) jury."

The trial court certified to the Circuit Court of Appeals all that was said upon the subject (R. 80 to 94), and we respectfully submit that your Honors will perceive from the record that the Government attorneys demurred to the charges made by your petitioner and prevented a hearing upon the matter. We quote (R. 88):

"Mr. Stewart: I take it that your Honor is following the recommendation of the Government and refusing to go into the matter?

"The Court: That is right. I don't think it is my duty.

"Mr. Stewart: I take exception to the action of the Court and exception to the ruling."

Your petitioner respectfully submits that the honorable Circuit Court of Appeals entirely misconceived the record when it held that (herein p. 81):

"There is not one scintilla of evidence in this case to support the charge that the grand jury or the petit jury was illegally or unfairly drawn, or that the inquiry was illegally or unfairly conducted, or that appellant was thereby harmed."

Your Honors will see from the record that, although requested, no opportunity was afforded petitioner to introduce evidence. As was said in *Carter* v. *Texas*, 177 U. S. 442, 449, the assumption by the Circuit Court of Appeals that no evidence was tendered by your petitioner is

"plainly disproved by the statements, in the bill of exceptions, of what took place in the trial court."

The Circuit Court of Appeals held that your petitioner's main contention in this respect was that (herein p. 81):

> "in proportion to population, there were fewer jurors drawn from the city of Chicago and its environs than from any other parts of the federal judicial district in which the case arose. It was stated in effect that it was manifestly unfair for the citizens of Chicago to be compelled to submit to trial before a jury predominated by citizens living outside the city, whose manner of living and moral concepts might be very different from those living within the city limits. Such suggestion does not merit serious consideration."

Your Honors will perceive that this was not in fact our main contention. Petitioner would have been glad to have a fair jury from any part of the district. The fact that jurors were so frequently drawn from the country demonstrated that they were not chosen at random, by lot. Our main contention was that the jury was hand-picked and packed against petitioner. The trial court declined to look into the matter and the honorable Circuit Court of Appeals evaded the issue. Our respectful application is that your Honors examine into the question upon our claim that petitioner has been deprived of his constitutional rights (VI Amendment, herein p. 75).

Your petitioner exhausted his peremptory challenges and challenged the jurors for cause, to no avail (R. 94), and then sought to waive the jury (R. 89).

As we have said, the attack made upon the indictments in the trial court was first by way of plea in abatement (R. 41, 45). These pleas were stricken (R. 43). Your Honors will see from the record (R. 42, 46) that your petitioner complained to the trial court that rights guaranteed to your petitioner under the fifth and fourteenth amendments to the constitution of the United States of America had been denied your petitioner. The indictments were again attacked by motion to quash (R. 53), and your petitioner claimed that rights guaranteed under the sixth

amendment to the United States constitution were denied to your petitioner. Your Honors will also see from the record (R. 434, 435) that your petitioner renewed the objections made by your petitioner as to the grand juries and the petit jury when your petitioner moved for a directed verdict. The same objections were again presented upon motions for new trial and in arrest of judgment (R. 437). In the notice of appeal your petitioner included among his grounds the points here urged (R. 440). Your Honors will find these points in the assignment of errors (R. 443). The honorable Circuit Court of Appeals said (herein p. 81) as to your petitioner:

> "We think there is no merit in these contentions."

So we respectfully submit that the points urged here have been properly preserved in the record and are such that this honorable court should take jurisdiction by certiorari.

In both the *Johnson* case and the case at bar, Mr. Hurley (assistant United States Attorney) submitted his case to an expert witness, Clifford, calling upon him to weigh the evidence and decide the issues. The Circuit Court of Appeals held that there was no error as against your petitioner, while at the same time holding that the error in this regard alone was sufficient to reverse the *Johnson* case.

In the case at bar, the honorable Circuit Court of Appeals said (herein, p. 86):

> "Such questions were quite proper and the province of the jury was not thereby invaded. There was no error in permitting the questions to be answered."

The honorable Circuit Court of Appeals said of Clifford in the *Johnson* case that (herein, p. 111):

> "It plainly discloses, however, that he decided in favor of the Government all the controverted issues upon which his answers were predicated."

Clifford did the very same thing in the case at bar (R.

235, 237), as we believe your honors will perceive from the record. The honorable Circuit Court of Appeals said in the *Johnson* case (herein, p. 111):

> "The mere recitation of the questions propounded and answers given by this witness demonstrates their gross impropriety."

The issues in the case at bar would have been very simple if the Government attorneys had been content to try an income tax case and to submit the contested questions of fact to the jury. But no, the Government attorneys insisted on trying local gambling conditions, appealed to the prejudice and passion of the jury and usurped the province of the jury by having their expert, Clifford, weigh the evidence and decide the very serious issues involved.

In the *Johnson* case, where Clifford gave testimony which, we respectfully represent, was identical with that given in the case at bar, the honorable Circuit Court of Appeals said (herein, p. 112):

> "We are of the view that the testimony of this witness, going to the very heart of the controverted issue and invading the province of the jury as it did, was so prejudicial and damaging that it alone would require a reversal of the judgment."

Your Honors will perceive from the record that if the Government ever had a case, which we respectfully dispute, their case was based entirely upon circumstantial evidence. The trial court gave the usual stock instruction defining circumstantial evidence and concluding that such evidence was legal (R. 414). Your petitioner offered a correct instruction (R. 418) to the effect that the circumstances must exclude any reasonable hypothesis of innocence, which instruction was refused. The honorable Circuit Court of Appeals held that (herein, p. 88):

> "We think the court fully and accurately instructed the jury upon the subjects of direct and circumstantial evidence and that its instructions substantially

covered that requested by appellant. Moreover, all of the evidence in this case was not by any means circumstantial, and we think the court did not err in this respect."

Your Honors have the record and will perceive that the honorable Circuit Court of Appeals is mistaken. This is a circumstantial evidence case. Of course, your Honors know that a defendant is entitled to instructions embracing his theory or any theory of defense reasonably based upon the evidence.

Your petitioner filed no returns and paid no taxes prior to 1929. The Government agents examined your petitioner's books and inquired as to why your petitioner had not filed income tax returns. Your petitioner stated to them, as testified to by them (R. 155), and as testified to by your petitioner (R. 276) without contradiction, that your petitioner did not file income tax returns because your petitioner had been advised by certain federal agents, named by your petitioner, that there was some question in the Department as to whether your petitioner should file and pay on gambling proceeds. Your petitioner for this reason had not filed. The Government agents arrived at a settlement and your petitioner paid $9200. The record abundantly shows that your petitioner has had money and has enjoyed a lucrative income since long before the income tax law was enacted. Your petitioner claimed, in his statement to the Government agents (R. 142) and as a witness in his own behalf (R. 275), that the money spent by your petitioner in excess of that reported as income was from previous earnings and savings. We respectfully submit that in view of this uncontradicted evidence there was no occasion for any instruction on presumption. Yet the trial court instructed the jury that (R. 417):

"Evidence that he did not file a tax return for any of these prior years may therefore be considered by you as an admission by him that he did not have a net income in excess of the amounts for which he would have been required by law to have filed a tax return."

The Circuit Court of Appeals held (herein p. 88) that this erroneous instruction could have done petitioner no harm because petitioner was acquitted for the first three years in the indictment. We respectfully submit that the Circuit Court of Appeals overlooked the fact that the only contested issue was whether your petitioner spent money which he had saved, or expended money from income. There was no room for any presumption upon the subject.

Despite our repeated objections in the trial court, we respectfully submit that there was absolutely no limitation placed upon the prosecutor in his cross-examination of your petitioner (R. 296, 304, 311, 293). In answer to our complaints in this respect, the Circuit Court of Appeals announced a few sound general rules (herein p. 87) but did not set out the errors complained of. We respectfully submit that the honorable Circuit Court of Appeals misapprehended the record, for the cross-examination permitted by the trial court actually deprived your petitioner of a trial in accordance with the laws of the land.

In a short studied speech to the jury, delivered in closing after his assistants had summed up, the United States Attorney told the jury that in his opinion your petitioner was guilty (R. 411). We quote:

> "Mr. Woll (United States Attorney): I represent the Government, and as long as I represent the Government, there never will come a time when I have to hold my head in shame and tell you one thing that I never believed in myself. **I believe in this case; I know this man is guilty** from that evidence on the witness stand. **I say** this evidence has proved him guilty."

The honorable Circuit Court of Appeals dismissed our respectful complaint by holding that (herein p. 87):

> "We have read the arguments of counsel, and we are convinced that they are not fairly subject to this criticism.
>
> * * * * *
>
> "It is only fair to say that neither appellant nor

his counsel raised any objection to the argument until long after the verdict was returned, when it was too late to reserve an exception."

The record, we respectfully submit (R. 411), shows an objection, and the trial court had previously announced that no formal exceptions would be required.

The jury retired on Friday, March 8, 1941, at 1:38 P. M. (R. 430), and at 10:35 A. M., Saturday, March 9, 1941, the jury sent a note to the judge to the effect that they were agreed on one indictment and deadlocked on the other. The trial judge brought the jury into court at 11:35 A. M. and ascertained that they had a verdict as to one indictment and were unable to agree on the other indictment (R. 426). The court ordered the one verdict received, but the defendant demanded a poll which was completed, not without difficulty. Mrs. Pohlman, the only juror from Chicago, hesitated and showed emotion by tears (R. 428). The verdict was recorded, and after the foreman reported that he did not think further deliberations would bring about an agreement, the jury was returned for further deliberations, over the objection of the defendant (R. 426). The jury was returned to the court again at 12:20 P. M., at which time the foreman said that some progress was being made (R. 428). The jury was returned to the jury room and at 2:53 brought in a second verdict, over the objection of the defendant, finding the defendant guilty as to 1937 and 1938, and not guilty as to 1933 to 1936, inclusive (R. 430).

We respectfully submit that piecemeal verdicts can not be sustained and that the honorable Circuit Court of Appeals misapprehended the record in regarding the indictments separately when in fact they had been consolidated. It is our respectful contention that the first verdict was based upon a void indictment; that it was not a complete determination of the case and was void. By recording the first verdict the jury exhausted its powers, therefore the second verdict was void.

In view of the admonition of your Honors that this petition must be prepared with studied accuracy, brevity and clearness, and the holding that this Honorable Court will not consider questions not raised by this petition, we respectfully list a summary of the errors committed by the trial court, upon which we respectfully submit that the honorable Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions; has decided important questions of general law in a way probably untenable and in conflict with the weight of authority; has decided important questions of federal law which should be settled by this Honorable Court; has decided federal questions in a way probably in conflict with applicable decisions of this Honorable Court; has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for this court's power of supervision.

It is our respectful contention that the errors committed in the trial court, and not corrected by the Circuit Court of Appeals, resulted in depriving your petitioner of a fair and impartial trial in accordance with the law of the land.

We would not burden your Honors now with what may seem to be minor errors over which the local courts ordinarily have final jurisdiction, but since we understand that the errors not claimed in this petition can not be urged upon the hearing, and since we expect to make the respectful claim that the trial below was one in form only, a mockery in which your petitioner was swept to a pre-determined conviction, we respectfully specify the errors to be urged in the event that this Honorable Court issues the writ.

B.

Specification of Errors to Be Urged.

It is respectfully submitted that the judgment should be reversed for the following reasons:

There is no evidence to support any of the guilty verdicts.

The trial court erred in refusing to instruct the jury as to the correct rule relative to circumstantial evidence.

The court erred in permitting the expert for the Government to decide questions at issue for the jury.

The court erred in permitting the prosecutors to assume facts improperly in the direct examination of Clifford.

The court erred in permitting improper direct examination and in unduly limiting the cross-examination of the expert witnesses for the Government.

The court erred in admitting the testimony of Edwin J. Raber and unduly limited your petitioner in his cross-examination of this witness.

The court erred in permitting improper cross-examination of your petitioner.

The prosecutors appealed to prejudice and placed your petitioner on trial for offenses not contained in the indictment and over which the federal court has no jurisdiction. The court erred in permitting such misconduct.

The prosecutors improperly prejudiced the rights of your petitioner by stating their personal belief as to the guilt of the defendant and by appealing to prejudice and passion.

The court erred in instructing the jury that evidence that your petitioner did not file returns for prior years might be considered as an admission that your petitioner did not have income sufficient to require a return.

Instructions were erroneous and misleading for the reason that the charge was not limited to that alleged in the indictment.

The court erred in refusing instructions offered by your petitioner calculated to confine the issues to the allegations made in the indictment.

The court erred in instructing the jury that their verdict was not to be determined by the exhibits in evidence.

The indictment is fatally defective.

A variance exists between the indictment and the proof.

The court erred in refusing a bill of particulars.

The indictment is duplicitous and the court erred in not sustaining a motion to quash.

The court erred in overruling the challenge to the array entered as against the grand juries and the trial jury.

The procedure adopted as to the verdicts was erroneous and such that neither verdict can properly stand.

The trial court erred in not quashing the indictment, in refusing to direct a verdict for petitioner and in overruling the motion in arrest of judgment for the reason that the grand jury was without power to act, illegally drawn and illegal.

The trial court erred in refusing to direct a verdict for the petitioner because of the failure of the Government to offer proof of the legal existence of the grand jury.

The Circuit Court of Appeals erred in affirming the judgment of the trial court.

This Honorable Court will be respectfully urged to enter such judgment or order as the nature of this proceeding and justice requires.

C.

Basis of the Court's Jurisdiction.

This Honorable Court may by certiorari have this cause certified to it for determination under the act of February 13, 1925, 43 Stat. 938, Ch. 229, Sec. 1, 28 U. S. C. A., amend-

ing and reenacting Sec. 240 (a) of the Judicial Code. The decision in the Circuit Court of Appeals was rendered October 31, 1941 (R. 497). The petition for rehearing, filed within the time allowed, was denied on December 4, 1941.—(R. 498).

D.

Questions Presented.

Whether the honorable Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such departure by the District Court as to call for an exercise of this Honorable Court's power of supervision. The most serious charges might be summarized as follows:

Can Government attorneys, and others, charged with the selection of grand and petit juries, adopt a system calculated to secure partisan jurors who favor the cause of the Government,, and such attorneys be permitted to block an inquiry into the manner in which the juries are chosen, and after the prosecutors have blocked a hearing in the trial court, can the Circuit Court of Appeals be permitted to evade the real issues by holding that petitioner did not prove his charges?

Can a conviction, based upon an indictment challenged as void, and so held by the Circuit Court of Appeals in a companion case, be permitted to stand?

Do the errors committed in the trial court and sanctioned by the Circuit Court of Appeals combine in depriving your petitioner of the right to a fair trial as guaranteed by the Constitution and laws of the United States?

E.

AUTHORITIES.

I.

This Honorable Court has indicated in its rules that a petition for certiorari is properly supported by a showing that a Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this court."

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, Sec. 314, p. 638, citing *United States* v. *Macintosh*, 283 U. S. 605, Rule 38, par. 5(b).

II.

Some of the decisions of this Honorable Court respectfully submitted to be applicable and disregarded by the Circuit Court of Appeals follow:

Carter v. *Texas*, 177 U. S. 442, 447.
Smith v. *Texas*, 311 U. S. 128.
Pierre v. *Louisiana*, 306 U. S. 354.
Neal v. *Delaware*, 103 U. S. 370.
Virginia v. *Rives*, 100 U. S. 313.
Berger v. *United States*, 295 U. S. 78.

III.

We respectfully submit that this Honorable Court should issue the writ of certiorari because the decision of the Circuit Court of Appeals is wrong.

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, sec. 304, p. 610, citing *Reynolds* v. *United States*, 292 U. S. 443; *Southern Railway Co.* v. *Walters*, 284 U. S. 190; *Payne* v. *United States*, 296 U. S. 659. (Dismissed by stipulation.)

IV.

We respectfully submit that the two decisions (Johnson and Skidmore) in the Circuit Court of Appeals could not be right.

Stringfellow v. *Atlantic Coast Line R. Co.*, 290 U. S. 322; *Compagnie Generale* v. *Elting*, 298 U. S. 217.

V.

The use of certiorari to correct error is proper in criminal cases.

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, sec. 304, p. 616, citing *Alford* v. *United States*, 282 U. S. 687; *Husty* v. *United States*, 282 U. S. 694; *Escoe* v. *Zerbst*, 295 U. S. 490; *Shepard* v. *United States*, 290 U. S. 96; *Payne* v. *United States*, 296 U. S. 659.

VI.

This Honorable Court, having granted an application for certiorari in Glasser v. United States (No. 798), which presents questions closely related to matters presented in the case at bar relative to jury selection, should allow this application.

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, sec. 309, p. 628, citing *Mitchell* v. *Maurer*, 293 U. S. 237; *General Motors Acceptance Corporation* v. *United States*, 286 U. S. 49; *General Import and Export Co.* v. *United States*, 286 U. S. 70; *United States* v. *Commercial Credit Co.*, 286 U. S. 63; *United States* v. *Corriveau*, 286 U. S. 530; *Gordon* v. *Washington*, 295 U. S. 30.

VII.

The Government has petitioned this Honorable Court in the Johnson case for a writ of certiorari (Docket Nos. 800, 801) and it is respectfully submitted that your Honors should take jurisdiction of the entire matter.

VIII.

Please see brief appended hereto.

F.

Reasons for Granting the Writ.

1. The honorable Circuit Court of Appeals has sanctioned a departure, by a lower court, from the accepted and usual course of judicial proceeding. Your petitioner has been denied a fair and impartial jury.

2. It is necessary for this Honorable Court to correct the prevailing method of selecting grand and petit juries in our district. At present jurors are hand-picked from the country districts, calculated to favor the cause of the Government, and the local courts refuse to permit a defendant to expose the manner in which jurors are picked.

3. This Honorable Court, in the pending case of *Daniel D. Glasser* v. *United States of America* (No. 798), granted a writ of certiorari. The charge was made in the *Glasser* case that juries are packed in the trial court, from which the case at bar originates. The honorable Circuit Court of Appeals has refused relief in the *Glasser* case and has also neglected to interfere in the case at bar. The illegal practice is vicious and of long standing, as shown by the records, and calls for correction by this Honorable Court.

4. The Circuit Court of Appeals has decided many important questions of general law in a way untenable and in conflict with the weight of authority.

5. The Circuit Court of Appeals, in a companion case (the *Johnson* case), decided that an indictment returned by the same grand jury involved in one of the cases herewith was void, and the Circuit Court of Appeals decided in said companion case that identical errors shown by this record constituted reversible error. In the *Johnson* case the Circuit Court of Appeals held that the Government attorneys should not be permitted to evade the real issue by moving to strike the pleas in abatement, while in the

case at bar the same Circuit Court of Appeals held that the same pleas were properly stricken by the trial court.

6. The Government has petitioned this honorable Court for a writ of certiorari in the *Johnson* case, a companion case (Docket Nos. 799 and 800), and it is respectfully submitted that your Honors should take jurisdiction of the entire matter.

7. Your petitioner has been denied that fair and impartial trial guaranteed by the Constitution and laws of the United States, as appears more fully from our brief and argument annexed.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. SKIDMORE,
Petitioner,

by WM. SCOTT STEWART,
Counsel for Petitioner.

December 22, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. .....

WILLIAM R. SKIDMORE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions of the Courts Below.

The trial court filed no opinion. The opinion of the Circuit Court of Appeals, before Justices Evans, Sparks and Major, as written by Mr. Justice Sparks (R. 486, herein p. 78), is appended and is not yet reported. The opinion of the Circuit Court of Appeals in the related case of *United States* v. *Johnson* (herein p. 90) is reported in 123 F.^{2} 111.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 31, 1941 (R. 497). Petitioner filed a petition for rehearing which was denied December 4, 1941 (R. 498). The jurisdiction of this court is invoked under section 347 (a) of Title 28, United States Code. (Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925.) See also Rule XI of the Criminal Appeals Rules, promulgated by this Honorable Court on May 7, 1934 (220 U. S. 666).

The specific claims advanced and rulings made in the lower court which are relied upon as the basis of the jurisdiction of this Honorable Court, with page references to the printed record, have been respectfully set out in our petition.

Statement of the Case.

Reference is respectfully made to the "Summary Statement of the Matter Involved" in our petition (herein p. 1).

Errors to Be Urged.

Reference is respectfully made to our petition under a similar heading (herein p. 30).

Questions Presented.

1. Was the Grand Jury legally constituted; were the jurors hand-picked?
2. Is the indictment sufficient?
3. Was petitioner afforded the right to an impartial jury?
4. Was petitioner afforded a fair trial and due process of law?
5. Was the evidence sufficient?
6. Please also see our Petition (herein p. 22).

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved are copied in the appendix (herein p. 75) and are as follows:

The Fifth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution.

U. S. C. A., Title 26, sec. 145 (b), p. 537.

U. S. C. A., Title 28, sec. 411, (Judicial Code, sec. 275).

U. S. C. A., Title 28, sec. 412, (Judicial Code, sec. 276).

Illinois Rev. Stats. (1939) c. 78, sec. 1.

Illinois Rev. Stats. (1939) c. 78, sec. 25.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

I.

A grand jury is a creature of statute and can have only the existence authorized by statute.

In Re Mills, 135 U. S. 263, 267.
Ex Parte Farley, 40 Fed. 66, 69.
See also *Johnson* case appended (herein p. 90).
United States v. *Johnson,* 123 F.[2] 111.

II.

Except where continued as provided by law, a grand jury has no existence beyond the term for which it was impaneled.

Jones v. *United States,* 162 Fed. 417, 421.
See also *Johnson* case appended (herein p. 90).
United States v. *Johnson,* 123 F.[2] 111.

III.

The Government was required to prove the material allegation of the indictment that the grand jury had "begun but not finished during said December term of court, among other things, an investigation of the matters charged in this indictment."

United States v. *Johnson,* 123 F.[2] 111. (Appended p. 90.)

The burden is on the prosecution to prove beyond a reasonable doubt that petitioner had a taxable income over the amount returned for each of the years involved. He

could not be guilty of attempting to evade a tax unless some tax was due.

Gleckman v. *United States*, 80 Fed. (2nd) 394, 399.
O'Brien v. *United States*, 51 Fed. (2nd) 193, 196.

The mere fact that petitioner had transactions involving large sums of money would not prove that all the money handled was taxable income.

Gleckman v. *United States*, 80 Fed. (2nd) 394, 399.
Oliver v. *United States*, 54 Fed. (2nd) 48, 50.

The burden of proof in a criminal case never shifts to the defendant.

McKnight v. *United States*, 115 Fed. 972, 974.
Chaffee v. *United States*, 18 Wall. 516, 545.
Nicola v. *United States*, 72 Fed. (2nd) 780, 788.
Minner v. *United States*, 57 Fed. (2nd) 506, 512.
Melton v. *United States*, 120 Fed. 504.

IV.

The court erred in overruling the challenge to the array which brought into question the manner in which the grand juries and the trial jury were selected.

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.

Smith v. *Texas*, 311 U. S. 128.

Until the court otherwise orders, jurors must be returned from the whole district. If no order is made, the presumption is that the court has determined that drawing them from the whole district will be most favorable to an impartial trial, and it will not unduly burden the citizens of any part of it, although some unnecessary expense may be incurred.

May v. *United States*, 199 Fed. 53, 59.

It is unfair to systematically exclude people who are qualified to be jurors, resident in Cook County and Chicago.

United States v. *Standard Oil Co.*, 170 Fed. 988.

Jury lists should, so far as possible, be free from suspicion or criticism.

United States v. *Murphy*, 224 Fed. 554.
Walker v. *United States*, 93 F.[2] 383, 391.
Atwood v. *State*, 96 Tex. Cr. Rep. 249, 257 S. W. 563.
Pollard v. *State*, 148 Ga. 447, 96 S. E. 997.
Pierre v. *Louisiana*, 306 U. S. 358.
Strauder v. *West Virginia*, 100 U. S. 303, 308.
Walker v. *United States*, 93 F.[2] 383, 391.

V.

Error in testimony of Clifford. The error committed in this regard alone is sufficient to reversal.

United States v. *Johnson*, 123 F.[2] 111 (herein pp. 90, 112).

As a general rule, the testimony of a witness must be limited to the facts of which he has personal knowledge. Giving in evidence his opinion or conclusions upon matters within the scope of common knowledge or experience, or where all of the relevant facts can be introduced, it is not permitted.

Wharton's Criminal Evidence (11th Ed.), sec. 944, p. 1658.
Connecticut Mutual Life Insurance Co. v. *Lathrop*, 111 U. S. 612.
Wigmore on Evidence (Third Ed.), Vol. 2, sec. 557.
Railway Company v. *Kellogg*, 94 U. S. 469, 472.
Hunt v. *Kile*, 98 Fed. 49, 53.
Insurance Company v. *Muhlman Co.*, 91 Fed. 85, 88.

Lumber Company v. *W. & B. L. & L. Co.*, 255 Fed. 645, 646.
Branan v. *Wimsatt*, 298 Fed. 833, 835.
Lisansky v. *United States*, 31 F.[2] 846, 851.

Even if the prosecutor had a right to examine his expert along the line indicated, he should have assumed a hypothetical person and stated his assumed facts in such a way as to leave it to the jury to determine whether the hypothetical person was this defendant, and allow the jury to decide if the facts assumed had been proven.

Rogers on Expert Testimony (1891), Chap. 1, sec. 28.

The law does not look with favor upon opinion evidence and the practice of receiving opinions has been subjected to considerable criticism. The law can not be relaxed to such an extent as to predicate one opinion on another.

22 Corpus Juris, Evidence, Sec. 594.
McAnany v. *Henrici*, 238 Mo. 103, 141 S. W. 633.
Cardinale v. *Kemp*, 309 Mo. 241, 274 S. W. 437, 447.
20 American Jurisprudence, p. 661, sec. 787.

An expert may not be asked his opinion based upon the testimony of witnesses not heard by him especially where it appears that he has not even read part of the testimony.

Nichols on Applied Evidence, Vol. 2, p. 2070, sec. 47.

It is error to call upon an expert witness to interpret the meaning of statements made by others.

Nichols Applied Evidence, Vol. 2, p. 2074, sec. 69.
22 Corpus Juris, Evidence, sec. 603.
McCray v. *State*, 134 Ga. 416, 68 S. E. 62, 20 Ann. Cas. 101.
Edwards v. *State*, 181 S. W. 195.
United States v. *Stephens*, 73 F.[2] 695.

Witnesses should not be permitted to state their views on matters of legal or moral obligations.

Greenleaf on Evidence (Lewis Ed. 1896), Vol. 1, sec. 441.

Jones Commentaries on Evidence (2nd Ed.), Vol. III, sec. 1336.

Federal courts are bound by the rules enforced in the State courts in the matter of the examination of experts.

Peters v. *Mutual Life*, 107 F.[2] 29.

It is not the proper practice to ask of a witness called as an expert, a question which does not embody a hypothetical statement of the facts, but which directly calls upon the witness to put himself in the place of the jury, and, in view of the evidence submitted, pass upon the whole issue.

Pyle v. *Pyle*, 158 Ill. 289, 299.

An expert witness should not be permitted to invade the province of the jury.

People v. *Rongetti*, 338 Ill. 56.

A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege of the party against whom he is called, and a denial of this right is prejudicial and fatal error.

Heard v. *United States*, 255 Fed. 829, 832.

Jones Commentaries on Evidence (2nd Ed.), p. 4565.

23 Corpus Juris, sec. 881, p. 103.

70 Corpus Juris, sec. 807, p. 638.

Meyer v. *United States*, 220 F. 822.

Collins v. *State*, 111 S. E. 733, 153 Ga. 95.

70 Corpus Juris, sec. 809, p. 641.

United Verde Extension Mining Co. v. *Ralston*, 37 Ariz. 554, 296 P. 262.

Thompson on Trials, sec. 405, p. 367, (2d Edit. 1912), sec. 406, p. 420.
Curry v. *State*, 162 S. W. 851, 72 Tex. Cr. 463.

Where a conviction is sought upon circumstantial evidence alone, the Government must not only show that the alleged circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the defendant. The court erred in refusing to so instruct the jury.

Anderson v. *United States*, 30 F.[2] 485, 487.
Marzen v. *People*, 173 Ill. 43, 50 N. E. 249.

The court erred in instructing the jury to the effect that evidence that the defendant did not file a tax return for prior years may be considered as an admission by him that the defendant did not have a net income sufficient to require a tax return.

When a rebuttable presumption presenting no inherent probative force is met by opposing evidence, the presumption is entirely destroyed and ceases to be a factor in the trial.

State v. *Brown*, 36 Utah 46, 102 Pac. 641.
Graves v. *Colwell*, 90 Ill. 612.
Reynolds v. *State*, 58 Neb. 49, 78 N. W. Rep. 483, 11 Am. Cr. Rep. 159.
State v. *Meyer*, 58 Vt. 457, 7 Am. Cr. Rep. 428.
Van Gorder v. *United States*, 21 F.[2] 939.
Sherman v. *United States*, 268 Fed. 516.
Tomplain v. *United States*, 42 F.[2] 205.

It is well established that the basis of a presumption must be a fact, and that one presumption cannot be a basis of another presumption.

Wagner v. *United States*, 8 F.[2] 581, 586.
Johnson v. *United States*, 146 Fed. 121.

Where a statement testified to in chief admits of two inferences, it is the proper function of cross-examination to eliminate the inference which is unfavorable to the defendant. This rule demonstrates the error in restricting the cross-examination of Raber.

Meyer v. *United States*, 220 F. 882.
United Verde Extension Mining Co. v. *Ralston*, 37 Ariz. 554, 296 P. 262.

When the defendant took the stand as a witness in his own behalf the prosecutor launched a smear campaign under the guise of cross-examination. That kind of cross-examination is error.

Little v. *United States*, 93 F.[2] 401, 408.
Lennon v. *United States*, 20 F.[2] 490, 494.
Glover v. *United States*, 147 Fed. 426.
Havener v. *United States*, 15 F.[2] 503.
Gideon v. *United States*, 52 F.[2] 427.
Hartzell v. *United States*, 72 F.[2] 569.
Salerno v. *United States*, 61 F.[2] 419, 424.
Allen v. *United States*, 115 F. 3, 11.
Gideon v. *United States*, 52 F.[2] 427.

The United States is not concerned in the enforcement of local laws regulating or prohibiting gambling in Cook County.

Willingham v. *United States*, 208 Fed. 137.

A new trial should be awarded where it appears that the prosecuting attorney has overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.

Berger v. *United States*, 295 U. S. 78.
United States v. *Perlstein*, 120 F.[2] 276 (283).
Beck v. *United States*, 33 F.[2] 107.
Nations v. *United States*, 32 F.[2] 598.

The indictment is fatally defective.

The indictment should set forth the facts so distinctly and so particularly that a conviction or acquittal would bar another prosecution for the same offense, and so clearly that the court may determine whether the facts stated support a conviction.

Fontana v. *United States*, 262 Fed. 283.
Lynch v. *United States*, 10 F.^{2} 947.
Jarl v. *United States*, 19 F.^{2} 891.
Partson v. *United States*, 20 F.^{2} 127.
United States v. *Wallace*, 35 F.^{2} 552.
Skelley v. *United States*, 37 F.^{2} 503.
White v. *United States*, 67 F.^{2} 71.

Undoubtedly the language of the statute may be used in the general description of the offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.

United States v. *Hess*, 124 U. S. 483.

It is fundamental that where a crime can only be committed by a particular class, the indictment should show on its face that the defendant belonged to that class by direct averment, not as a mere conclusion of law.

Johnson v. *United States*, 294 F. 753.
Anderson v. *United States*, 11 F.^{2} 938.
Kutler v. *United States*, 79 F.^{2} 440, 442.

The indictment is defective for uncertainty for the reason that material portions are laid under a videlicet.

Rose v. *Mutual Life Insurance Co.*, 144 Ill. App. 438.
19 Enc., Pleading and Practice, sec. 215, 253.

Gould's Pleading and Practice, Chap. 3, pp. 72, 77.

Bishop's New Criminal Proceedings, sec. 406, p. 252.

1 Greenleaf on Evidence, sec. 60, in appendix of second edition.

Chitty's Pleading, 317, 318.

Starkies Criminal Pleading, 277, 278.

Clark's Criminal Procedure, 173, 174.

31 Corpus Juris Indictments and Informations, sec. 184.

Stukeley v. *Butler,* Reports of Sir Henry Hobart (p. 300, 302, margin 168, 169).

If the portions of the indictment under videlicet are to be held to be material that must be proved as laid and a fatal variance exists.

Brown v. *Berry,* 47 Ill. 175.

Gleason v. *M'Vickar,* 7 Cowen's Rep. (N. Y.) 41.

Skinner v. *Andrews,* 1 Saund. 170.

Derragon v. *Rutland,* 58 Vt. 128, 135, 3 Atlantic 332.

State v. *Grimes,* 50 Minn. 123, 52 N. W. 275.

Anderson v. *United States,* 30 F.[2] 485.

Clark v. *Employers Liability Assurance Co.,* 72 Vt. 458, 48 A. 639, 642.

Frank v. *Morris,* 57 Ill. 138.

State v. *Scovill* (Mo. App.), 15 S. W.[2] 931, 935.

Kutler v. *United States,* 79 F.[2] 440.

Naftzger v. *United States,* 200 F. 494.

Anderson v. *United States,* 30 F.[2] 485.

United States v. *Burnham,* 1 Mason's Cir. Court Rep. 57.

The court erred in refusing a bill of particulars.

Singer v. *United States*, 58 F.[2] 74.
United States v. *Empire State Paper Co.*, 8 Fed. Supp. 220, 221.
United States v. *Farrington*, 11 Fed. Supp. 214.
Wong Tai v. *United States*, 273 U. S. 77.

The indictment alleges two distinct offenses and is therefore duplicitous.

Bratton v. United States, 73 F.[2] 795, 797.
Creel v. *United States*, 21 F.[2] 690.
Evans v. *United States*, 153 U. S. 584, 587.
Rumley v. *United States*, 293 F. 532.

Neither verdict can be sustained, as the law does not sanction piecemeal verdicts.

Jurors should not be permitted to return piecemeal verdicts; all their conclusions must be comprehended in a single verdict.

Commonwealth v. *Parker*, 294 Pa. 144, 143 A. 904, 907.
United States v. *Watkins*, Fed. Cas. 16649, 28 Fed. Cas. p. 419, 478 (3 Cranc. C. C. 441).

The error which brought about the situation in the case at bar is harmful, and there is no cure for it but the grant of a new trial.

Owens v. *State*, 40 Ga. A. 508, 150 S. E. 455.

ARGUMENT

Grand Jury Illegal.

It must be remembered that all petitioner requested was a hearing upon this charge that the investigation against him had not started at the regular term of the grand jury. Surely, the recitation made by the grand jury in the inducement was not conclusive. If the orders of court extending the grand jury be examined, it will be seen that in the light of the *Johnson* opinion they are susceptible to the construction that the jury was illegally authorized to return indictments in which the investigation began in February.

Upon first blush one might think a distinction should be made because the indictment in the case at bar was returned in the February Term and that in the *Johnson* case was returned in the March Term. But both were returned after the illegal order authorizing the jury to continue investigating matters commenced in February. If in fact the investigation against your petitioner had commenced in February, it matters not when the indictment was returned or what was said in any order; the grand jury had no power to act. The fact as to when the grand jury commenced its investigation was easily ascertainable in a short time. We respectfully submit that your petitioner could have made no more positive allegation than that which he made under oath (R. 32):

> "(4) There was no evidence had or taken or submitted to the alleged December A. D. 1939 term grand jury touching the subject matter of this indictment."

Your Honors will perceive from the *Johnson* record which is before this Honorable Court (Docket Nos. 799 and 800) that the same allegation was made by all the defendants, including your petitioner, in the *Johnson* case. It is

difficult to understand why petitioner was not afforded a hearing in the trial court, and the difficulty becomes greater when it is observed that upon the identical facts one group of defendants (in the *Johnson* case) was afforded relief in the Circuit Court of Appeals and your petitioner was denied relief.

When petitioner charged that the grand juries returning indictments against him had been hand-picked, it would seem that ordinary justice demanded a hearing. There can be no suggestion that petitioner was out of order or unduly attempting to delay the trial. The record shows that any complaint your petitioner had to make by way of plea in abatement was foreclosed by the striking of his pleas. When your petitioner charged in his motion to quash that the grand jury was hand-picked, the trial judge announced that he did not care to hear anything on that charge (R. 82).

The Challenge to the Array.

The only conclusion your Honors can reach from this record, we respectfully submit, is that the reason your petitioner was denied a hearing was that the prosecutor knew the charges to be true. The cases we have cited show that similar charges have been made over a period of years. It is a fair inference from all of this to say that it is common knowledge that a defendant cannot secure a fair trial before a jury in the Federal court in Chicago. The system has worked to the advantage of the prosecutor so long that he is loath to surrender it. The trial judge passed the responsibility to the Circuit Court of Appeals. There, as your Honors perceive, the question was evaded. The attempted evasion follows the pattern of *Carter* v. *Texas*, 177 U. S. 442, 447, and other cases cited in our petition (herein p. 24, II).

The drawing of jurors is governed by Statute and custom (U. S. C. Title 28, sec. 411, Judicial Code sec. 275, U. S. C. Title 28, sec. 412, Judicial Code sec. 276, Ill. Rev.

Stats. (1939) c. 78, sec. 1). We are not standing upon any technical point. As was said in *Pointer* v. *United States*, 151 U. S. 396, 407:

> "* * * the mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offences."

All your petitioner sought was an impartial jury. The charge made by your petitioner was more than an imputation. In *United States* v. *Chaires*, 40 Fed. Rep. 820, 823, it was held that even a defective plea should put the court on inquiry.

We respectfully submit that our position in the case at bar is founded on stronger ground than that of the defendant in *Neal* v. *Delaware*, 103 U. S. 370, where the state officials, without success, endeavored to evade the real issue upon procedural technicalities. It was held (390) that the trial court was bound to redress the wrong which was a violation of the constitution:

> "As was said by us in *Virginia* v. *Rives, supra* (100 U. S. 313) 'The court will correct the wrong, will quash the indictment, or the panel, or if not, the error will be corrected in a Superior Court' and ultimately in this court upon review."

Judge Sullivan, the trial judge, in the case at bar said (R. 88):

"I don't think it is my duty."

Your petitioner charged (R. 55), among other things, that those outside of Chicago were favored and an effort was deliberately made by those in charge to obtain jurors calculated to be unfavorable to your petitioner by choosing executives and suburbanites. That those in charge unlawfully, intentionally and systematically excluded qualified voters from among the persons summoned and listed for

jury service on both grand and petit juries solely because those excluded might, by reason of their place of residence, occupation and station in life, be open and fair minded concerning the rights of defendants, and that those in charge unlawfully discriminated in favor of prospective jurors who might favor the cause of the prosecution. Your petitioner set up the manner in which he feared prejudice. That a feud existed between the State's Attorney and the city authorities, resulting in ax raids. That in order to discredit the city administration your petitioner was named in the newspapers as one who collected and paid bribes. That these charges had been repeated deliberately in the newspapers on the eve of this trial in order to prejudice your petitioner in his right to a fair jury. Your petitioner charged that persons drawn from Chicago in the ordinary walks of life would be more apt than those of the class usually selected for services in the Federal Court to understand the methods employed by the newspapers, and would know that many false charges are so made for political purposes. Your petitioner said that he feared that gambling would be made an issue and that he could not secure a fair trial before a jury so chosen. Your petitioner caused a search to be made of the records, showing jurors drawn from the past five years, and demonstrated to the court that although the population of the City of Chicago and County of Cook comprised 85% of the District, the jurors were chosen from the country and suburbs to the extent of 85%. Your petitioner represented to the trial court that he feared that the same disproportion would appear in the special venire. The list of jurors was given your petitioner just before trial and, as shown by the record, the discrimination feared by your petitioner was shown by the list. As appeared from the jury list (R. 90), only four of the fifty were from Chicago, Chapman, Schmettzer, Tesch and Weiner. The court excused Schmettzer and Chapman, and Weiner was not found. This left but one,

Tesch, from Chicago, on the special venire. This juror lived so near the county line he might be classified as a suburbanite. Tesch served on the jury (R. 94).

We respectfully request a careful study of the affidavits of Mr. C. A. Caplow (a member of the Bar in Chicago), who reported the manner in which he searched the records in order to reflect, as near as possible, the condition which existed for the past two years. Your Honors will see that this search was painstaking and exhaustive, including (R. 58) the files and records of the Clerk of the trial court, the United States Jury Commissioner's office, of the Jury Commissioner of Cook County, Illinois, of the official census reports, of the Cook County Election Commissioner, of the Chicago Board of Election, of the County Clerk of Cook County, Illinois. Mr. Caplow describes the method employed and the custom, which is to address written requests to the several postmasters, women's organizations, church groups and other kindred private organizations, for the names of citizens in their political district or within their social sphere who might qualify as jurors. (Please also see the *Glasser* case.) The questionnaires were sent to the individuals thus recommended; then from the answers jurors were selected. It was represented to the trial court that your petitioner or anyone connected with gambling or Chicago politics had no chance to secure the presumption of innocence at the hands of a body so selected.

Mr. Caplow in his affidavit presented to the trial court a table (R. 59) showing the population of the various counties in the District in numbers as well as in percentage, from which table it will be seen that Cook County has 85% of the population. It will be seen that Chicago has 83% of the population of Cook County (R. 69).

As your Honors will perceive, the affidavit shows the number of persons drawn for grand jury service and for petit jury service during 1939 and 1940, with a table show-

ing their distribution as to counties. The affidavit shows a calculation of the distribution which any defendant had a right to expect if the drawing had been by lot or fairly conducted in some manner which would bring about a fair representation according to population as to qualified voters and jurors. This showing of the record is carried into the grand juries returning these indictments, and the same unfair distribution is shown by the record to have applied to a number of cases recently tried in the District Court. Then the record shows that the same discrimination existed as to the special venire called to try the case at bar. As Mr. Justice Black said in *Pierre* v. *Louisiana*, 306 U. S. 354, if the prosecutors or authorities had had any contradictory evidence as to these conditions which are reflected by the records, they would have produced it. Mr. Ryan, representing the Government in the case at bar, said that (R. 82):

> "the Government takes the position that the challenge to the array here shows on its face, together with the affidavit filed in connection with it, that it is not entitled, that it is not sufficient in law to entitle the defendant to quash the panel in this case."

It appears that names were drawn by lot from the lists so selected (R. 59). But as in the *Pierre* case, there is no chance for a fair drawing by lot from a hand-picked list.

Mr. Ryan said in the case at bar (R. 83):

> "These statistics were submitted upon the theory that the law requires there be an apportionment of the members of a panel from the various parts of the district in accordance with their population, and in that connection I would like to discuss the cases."

Your Honors will see that Mr. Ryan admitted that the statistics were correct, but Mr. Ryan misconceived our position. If we had merely shown that only one juror out of fifty drawn for the trial was from Chicago that may have been an accident. It may have been accidental that the two

grand juries were drawn largely from the country (R. 74). But when we charge that these juries were drawn pursuant to an illegal custom which has been practiced for years, and when we submitted figures to support our claim, it can not be said that we complained merely because the jurors happened to have been drawn from the outlying districts.

Your Honors will notice that the prospective jurors were examined by the court as to their qualifications, including suggestions by the parties (R. 94). The trial judge forced the defendant to trial with the hand-picked panel. Your petitioner exhausted his peremptory challenges and then renewed his objections to the panel in the form of a challenge for cause after his peremptories were exhausted (R. 94). So your Honors will see that your petitioner did everything in his power in his effort to secure a fair trial jury.

As to the grand juries the court refused to hear the matter at all, as appears from the following (R. 82):

> "The Court: Is that all?
> "Mr. Stewart: That is all, your Honor.
> "The Court: I don't care to hear from you—
> "Mr. Ryan: You don't want to hear—
> "The Court: I say, I don't care to hear from you on this first point.
> "Mr. Ryan: No, sir.
> "The Court: I mean as to the indictment not being sufficient. I would like to hear from you concerning this jury."

The trial judge has certified all that was said by the Government attorneys on this subject (R. 80 to 90), from which your Honors will see that the Government attorneys demurred to our charge. The language used by Mr. Ryan is quite significant. We quote (R. 87):

> "And the Government moves that this challenge be summarily overruled, your Honor, and that the prosecution be permitted to proceed in the usual manner."

This was said, as your Honors perceive, by the Government attorneys after we charged that the usual manner consists in packing the jury against a defendant.

In *In Re Petition for Special Grand Jury*, 50 F.^{2} 973, it was said:

> "This petition suggests the selection of the special grand jury by certain citizens and certain organizations of Luzerne County. Such method of selection is not permitted by the laws of the United States. The law requires that the selection of names to go into the jury box be made by the Commissioner of jurors and by the Clerk of the court. Section 412, United States Code Annotated, title 28. No other person or official has the right to participate in such selection. *United States* v. *Murphy* (D. C.), 224 F. 554.
>
> "The petition further suggests that the special grand jury be selected from Luzerne County. While a grand jury may be selected from a particular section of the district, such method of selection should not be employed unless found necessary; such method has never been used in this district, and it might result in a prejudiced grand jury, and an unfair investigation and create an unwise precedent."

As was said in *Smith* v. *Texas*, 311 U. S. 128, 85 L. Ed. 106, 108:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

There was no order in the case at bar to select the jury from any particular part of the district. As was said in *United States* v. *Coit*, Fed. Cas. No. 14,829:

> "it was completely in the power of the marshal to return at any time just such a jury as would answer the purposes of the Government, or any of the officers of the Government having an interest in the cause to be tried."

The panel was quashed, also quashed in *State* v. *Austin,* 183 Mo. 478, 82 S. W. 5. In *May* v. *United States,* 199 Fed. 53, 59, it was held:

> "Until the court otherwise orders, jurors must be returned from the whole district. If no order is made, the presumption is that the court has determined that drawing them from the whole district will be most favorable to an impartial trial, and it will not unduly burden the citizens of any part of it, although some unnecessary expense may be incurred."

We shall briefly notice the authorities cited to the trial court (as shown by the record) by Mr. Ryan on behalf of the Government in the case at bar. But first permit us to respectfully refer to a case on all fours with the one at bar.

United States v. *Standard Oil Co.,* 170 Fed. 988.

In the above case Judge Anderson, in 1909, allowed a challenge to the array of jurors on the ground that while the City of Chicago had more than two-thirds of the total population of the Northern District of Illinois from which the jury was drawn, only 3 out of 150 jurors in the panel resided in Cook County, and that 6 per cent of the jurors drawn were farmers or retired farmers. We respectfully refer your Honors to all that was said upon the subject, as appears from the report, and quote the following (995):

> "I don't feel under all the circumstances that the jury selected in this panel would be entirely unobjectionable. I don't mean by that that there is anything in the composition of it, so far as the individual men are concerned, that can be reasonably objected to; but, **however this thing happened, I don't like the looks of it.** I don't see any reason why the qualified jurors, people who are qualified to be jurors, resident in Cook County and Chicago, should be **systematically** left out of this box. I think that the jury commissioners, in putting the names in the box, ought to put in a fair proportion of qualified jurors from this county. I don't want to start in this trial feeling my-

self that something is not quite fair. **I don't want to start in the trial with the defendant and its counsel feeling there is something that is not quite fair about it.** I feel that we ought to start fair and keep fair. At least we ought to begin fair, and I think this panel ought to be set aside." (*Emphasis added.*)

We respectfully submit that the reasons given by Judge Anderson for quashing the panel in the *Standard Oil* case are most appropriate here in the case at bar. Your Honors will notice that Judge Wilkerson represented the Government in the *Standard Oil* case. It is fair to say that all judges and public officials in our District know that defendants feel that there is nothing fair about the manner in which Federal juries are picked. Now, to return to the cases cited by Mr. Ryan to the trial court.

Ruthenberg v. *United States*, 245 U. S. 480, 482.

In this case the defendants complained that the Sixth Amendment was violated because the jurors were not drawn from the entire district but only from one division thereof. If we were complaining in the case at bar that jurors were not drawn from the Western Division, this case would be in point. An examination of the cases cited shows further that the question decided is not the one in the case at bar. The Circuit Court of Appeals cites the *Ruthenberg* case (herein p. 82), thereby demonstrating a failure to grasp our point. The Appeals Court also cites the *Scadlund* case hereinafter noticed.

Lewis v. *United States*, 279 U. S. 63.

This case cites *Ruthenberg* v. *United States*, 245 U. S. 480, 482, and is similar in principle. Not in point here. The county where the offense had been committed had been transferred from one District to another and the defendant attacked the jurisdiction of the court. Held that the court had the same jurisdiction as before, and there was no error in drawing jurors from only part of the District.

That the Sixth Amendment did not require jurors from entire District.

We respectfully quote from that which Mr. Ryan said in the trial court (R. 5):

> "In the case of *Lewis* v. *United States,* the Court further passed upon the construction of this particular provision, and there it said the 6th Amendment does not require that the accused be tried by jurors drawn from the entire district.
>
> "It is submitted that the only requirement, your Honor, of the 6th Amendment, is that the jurors be not drawn from without the district, and there is no requirement that they be drawn from the whole district."

Your Honors will readily perceive that the prosecutor contended in the trial court for the right to select and hand-pick his jurors. The policy of the law, as we understand it, is that jurors should be drawn by lot (*People* v. *Lieber*, 357 Ill. 423). In *Pierre* v. *Louisiana,* 306 U. S. 354, the Supreme Court of the United States recognized the fact that exclusion of negroes could not have been by accident or result from an impartial drawing of jurors. The spirit of the law seems to be that jurors should be chosen by lot, fairly, in such manner that discrimination is not favored.

The *Lewis* case is one of the many authorities holding that unless the contrary appears it will be presumed that the jurors were drawn in compliance with the rule or order of Court. Such authorities, we respectfully submit, are not in point because in the case at bar the contrary does appear. In the case at bar the Government practically admitted our charge. Although we respectfully asked the trial court to investigate the matter, we respectfully submit that, after the argument made by Mr. Ryan on behalf of the Government, there was nothing left for investigation. The facts were evident and were not disputed. It must be significant to your honors that the Government attorneys objected to a waiver of the jury by your Petitioner. (R. 90.)

Needham v. *U. S.*, 73 F.[2] 1.

The point we make in the case at bar was not properly pleaded in the *Needham* case. An oral motion was made. A motion and affidavit was later filed, and the honorable Circuit Court of Appeals held that some parts of the motion were abandoned. In the *Needham* case the defendant did not exhaust his peremptory challenges, so it is fundamental that he was in no position to complain of the ruling below. This case, we respectfully submit, is easily distinguished from the case at bar.

Seadlund v. *U. S.*, 97 F.[2] 742, 747.

Mr. Ryan, representing the Government in the case at bar, stated (R. 7) to the trial court that Seadlund complained of too many jurors from Cook County. We mention this only to illustrate the power improperly placed in the hands of the Jury Commissioners. As an authority the *Seadlund* case, we respectfully submit, is easily distinguishable from the case at bar. The defendant in that case took the position that the law requires a jury from the entire District. Our respectful complaint in the case at bar was that the jury was hand-picked, with the object of convicting your petitioner. The disproportion was merely one of the facts which confirmed our charge. We respectfully submit that in the case at bar the prosecutor, Mr. Ryan, practically admitted our accusation that the jury was hand-picked. All we sought was a fair and impartial jury. The Statute referred to in the *Seadlund* case is not involved here.

Mr. Ryan told the trial court (R. 86) that we could have come in before trial and requested an order that the jury be drawn from a certain part of the District. No such order was requested or entered, and we do not understand that a defendant is required to move for a fair jury before trial. We respectfully submit that the burden or duty to

see that a defendant secures a fair jury is upon the prosecuting authorities, subject to the further duty of the court to also see that a defendant is not prejudiced. This burden placed upon the prosecutor is mentioned in *United States* v. *Price*, Fed. Cas. No. 16088.

United States v. *Price*, Fed. Cas. No. 16088.

In this case, cited by the Government in the trial court, the Marshal selected jurors from inland in a case involving shipping. It was charged by the defendants that no attempt was made in the trial court to comply with the State Statutes intended to insure a fair jury. The court below ruled with the United States, but if we understand, the court of review's disapproval is indicated. The demurrer admitted irregularity and the challenge should have been sustained.

An important principle is stated in the *Price* case, and that is, that the plaintiff should see that the jury is properly selected and should expect a challenge. The prosecutor, as your Honors know, occupies an official position which makes it his duty to see that a defendant secures a fair trial. He should seek no advantage, and when it is charged that juries are being hand-picked, we respectfully submit that the District Attorney should welcome an investigation and be the first to stop the abuses practiced. The great and powerful United States Government, we respectfully submit, does not need, and its agents should not seek, an advantage over any citizen.

United States v. *Murphy*, 224 Fed. 554.

The challenge to the array was sustained. The opinion points out that such action was proper for the reason that the United States Attorney furnished some of the names. Much that appears in the opinion was not necessary for the decision except as advisory. We have no quarrel with

the general principles stated. The court said in passing that there was no law requiring the panel to be apportioned in accordance with population. No attention was paid to that (p. 559). We respectfully submit that if the panel had been hand-picked and the disproportionate feature only one of the elements, a different question would have arisen, one more like the case at bar. We quote from the *Murphy* case (560):

> "Jury lists should, so far as possible, be free from suspicion or criticism."

The court quotes with approval from *Klemmer* v. *Mount Penn Gravity R. R. Co.*, 163 Pa. 521, 530, 30 Atl. 274, where it is said that if the wheel had been filled by selections made by political and personal friends of the board a motion to quash would be sustained.

> "We would do this, even though as to irregularities of less gravity appellant might be treated as having waived them. One of this character no consent or waiver of parties could cure."

Authorities Referred to by Petitioner on Jury Question.

By Sec. 411, Title 28 U. S. C. A. jurors in Federal Courts must respond to the same qualifications as are provided for the state courts. Sec. 415 provides for no discrimination because of race, and 413 authorizes the judge to order jurors from such parts of the District as will insure an impartial trial and not incur unnecessary expense or unduly burden the citizens of any one part of the District. No order was entered under section 413 in the case at bar, and no such order could be defended if it provided that the jury be selected with a view of favoring the prosecution. Mr. Ryan argued that your petitioner could have applied for an order under 413, but we respectfully submit that that is beside the point. We shall respectfully refer to a few of the cases wherein it was held to be proper to order the jury under Sec. 413.

In *Walker* v. *United States*, 93 F.^{2} 383, 391, the court ordered that prospective jurors from Kansas City be omitted because of the wide publicity given the case where the defendants resided, involving election frauds. This was done in order to secure an impartial jury, and it was held that the discretion of the court was not abused. Your Honors will notice that the Clerk testified that wage earners and laborers were on the list. It appears that a letter was sent out in order to aid the authorities in securing names. The letter is copied in the opinion and is construed not to be discriminatory. The Circuit Court of Appeals infers, we respectfully submit, that if the letter had been a step in discrimination, the panel would have been quashed. Please compare the method adopted in the case at bar (R. 58, 59) as to the letter. The jury commissioner has no authority to delegate his power or duty (*In Re Petition for Special Grand Jury*, 50 F.^{2} 973).

In *Jarl* v. *United States*, 19 F.^{2} 891, an order of the court directing that the jury be drawn from all counties but one, containing Omaha, was upheld. Again we respectfully submit that this was proper under the statute in an effort to obtain an impartial jury for the reasons suggested.

In *Frantz* v. *United States*, 62 F.^{2} 737, 739, the judge excused all on the panel from one county. A former trial had resulted in a disagreement and the judge was endeavoring to secure an impartial trial. No claim was made that the trial court's discretion was abused and no prejudice was apparent.

In *United States* v. *Miners Transportation Co.*, 187 Fed. 355, the court ordered a panel drawn, and in its order designated the number of jurors to be included from each county. The defendant complained that although one county had a large population jurors were not to be chosen in proportion thereto. The court points out reasons for

such action. Some districts do not contain as many qualified jurors in proportion to population as others. The order was intended to secure a fair jury. No such reason could be given in the case at bar, and we charge, without dispute, that the disproportionate selection was only one step in loading the panel.

In *Spencer* v. *United States,* 169 Fed. 562, the boundaries of the District were changed. The court ordered that jurors not be drawn from the county where the court sat. The purpose was to secure an impartial jury and there was no error.

In *Atwood* v. *State,* 96 Tex. Cr. Rep. 249, 257 S. W. 563, it appeared that qualified electors were intentionally left off the list, which was held erroneous and of such materiality as to require reversal.

In *Pollard* v. *State,* 148 Ga. 447, 96 S. E. 997, it was held error to draw the petit jurors from the grand jury box. One had a right to select the trial jury from an array or panel indifferently drawn from the whole body of citizens and not from a restricted number thereof.

As is shown by the record in the case at bar (R. 89), the following took place:

> "Mr. Stewart: And then the defendant has a written waiver of jury. What is your attitude on that?
>
> "Mr. Woll: I suggest, if your Honor please, if we could have a short recess—
>
> "The Court: You mean to discuss that matter?
>
> "Mr. Woll: As to that matter.
>
> "The Court: Well, of course, the Court must also agree and consent to the waiver, and your motion to eliminate the jury and have the Court hear it, that is what it is tantamount to, will be denied.
>
> "Mr. Stewart: Exception.
>
> "Mr. Woll: I might state for the record, if your Honor please, that we oppose the waiver of a jury trial."

The importance of calling your Honors' attention to this is to show your Honors that your petitioner did everything in his power to avoid a trial with an illegally selected and unfair jury. We respectfully submit that your petitioner had every right to fear a certain conviction, regardless of the evidence, at the hands of a jury so chosen.

In the cases of *West Chicago Street Railway Co.* v. *Annis*, 165 Ill. 475, 479, *Chicago C. R. Co.* v. *Creech*, 207 Ill. 400, and *Paul* v. *Garman* (Ill. App.), 34 N. E.[2] 884, 891, the court said that in considering error assigned as to argument claimed to be improper, the court will take into consideration, among other things, "the temper and character of the jury." This Honorable Court will be good enough to keep in mind the temper and character of the jury in the case at bar in determining the prejudice claimed to have been created by the prosecutor.

Your Honors will notice also, when it comes to consideration of our objections based upon the irregularity of the return of the verdicts, that the jury was polled (R. 427, 428). Mrs. Pohlman hesitated and shed tears, indicating, to us, her reluctance to convict the defendant upon the flimsy evidence submitted by the Government. Mrs. Pohlman was from the regular panel and was the only juror of the twelve who served who lived in Chicago (R. 93). We don't count Henry Tesch, as he lived on the outskirts.

In *Pierre* v. *Louisiana*, 306 U. S. 358, the court said that if the venire for petit jury should be quashed it necessarily followed that the indictment should have been quashed. Mr. Justice Black said (358):

> "Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races —otherwise qualified to serve as jurors in a community—are excluded as such from jury service."

The Fourteenth Amendment is not applicable in the case

at bar, nor is discrimination because of race or color involved, but we respectfully submit that the underlying principles are the same. As was said in *Strauder* v. *West Virginia*, 100 U. S. 303, 308:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called 'packing juries.' It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."

The last named case also involves the negro question, but the court, in passing, holds that the discrimination would be just as unlawful if all white men were excluded or all naturalized Celtic Irishmen were omitted. In *Mamaux* v. *United States*, 264 F. 816, the defendant claimed that wage earners were excluded, but it was held to be of no avail because he failed to show the manner in which he was prejudiced. The defendant in the case at bar, as we have stated, pointed out the manner in which his case would not receive a fair trial at the hands of a hand-picked jury from the suburbs and outlying parts of the District, from which the every day wage earners had been excluded. See also *Smith* v. *Texas*, 311 U. S. 128; *Walker* v. *United States*, 93 F.^{2} 383, 391.

As your Honors have perceived, the challenge to the array was overruled by the trial court, and this adverse ruling has been duly assigned as error in the Circuit Court of Appeals (R. 446). The honorable Circuit Court of Appeals held that our respectful complaint did not merit serious consideration (herein p. 81).

This Honorable Court will perceive that it was the paramount and manifest duty of the judge and prosecution to see to it that your petitioner secured an impartial jury, and that there should not have been a suspicion of irregularity. Surely, your Honors will agree that the serious charge made by the petitioner, and not denied by the Government, that his jury was hand-picked and packed against him, can not be lightly brushed aside.

Your Honors will see that the only reason that there was no evidence was that the prosecutor succeeded in blocking the offer of your petitioner to produce evidence. We respectfully request your Honors to read the transcript (R. 80) for the facts, we quote:

> "Mr. Stewart: All we are asking the Court to do is to ascertain the facts, and if the facts are that these jurors are selected in such a manner that it is not by lot, why, that can be a grave danger to the liberty of any defendant.
>
> "If a jury commissioner or a marshal or a sheriff is permitted to go out and just pick jurors that he thinks he wants in that particular case, why, they can control the result.
>
> "So the motion here now is that your Honor follow up this charge that is made by examining into the question of the composition of this panel and the manner in which it is selected."

We respectfully submit that the manner in which the prosecutor successfully prevented the introduction of evidence and a full inquiry as sought by your petitioner is shown by the record, from which we quote further (R. 87):

> "Mr. Ryan: Your Honor, the Government takes the position that the challenge to the array made here shows on its face, together with the affidavit filed in connection with it, that it is not sufficient in law to entitle the defendant to quash the panel in this case.
>
> "The Court: Anything further, Mr. Stewart?
>
> "Mr. Stewart: No, your Honor.
>
> "The Court: Nothing further.

"All right, Mr. Clerk, motion to quash is overruled."

* * * * * *

"Mr. Stewart: I take it that your Honor is following the recommendation of the Government and refusing to go into the matter?

"The Court: That is right. I don't think it is my duty.

"Mr. Stewart: I take exception to the action of the Court and exception to the ruling."

So your Honors will perceive that the trial court followed the recommendation of the Government attorneys and refused to hear the evidence.

We respectfully submit that the honorable Circuit Court of Appeals inadvertently evaded the real question by a misconception of the record.

We respectfully quote from the opinion in the *Johnson* case (herein p. 100):

> "There may be room for contrariety of opinion as to the precise manner in which the authority of a Grand Jury should be challenged, but we doubt if any will contend that the Government can wholly evade the challenge as has been done in the instant case. Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment."

This language is particularly applicable in the case at bar as to the manner in which petitioner's challenge to the grand jury and trial jury was evaded.

The same honorable Circuit Court of Appeals said in the *Johnson* case (herein p. 97):

> "We are not unmindful of the rule invoked by the Government that pleas in abatement and those of a kindred nature must be strictly construed. Facts must be stated, not conclusions. Here, however, the allegations were direct and positive. It is difficult to see how they could have been more specific. The challenge went to the very heart of the authority of the Grand Jury to act. The Government's motion to strike should have been overruled and the Government required to

answer. The defendants were entitled to an opportunity to offer evidence in support of the motion and plea. *Carter* v. *Texas,* 177 U. S. 442, 447."

Further the honorable Circuit Court of Appeals said in the *Johnson* case that (herein p. 100):

> "Failure to have proved venue, no doubt, would have been fatal to the judgment. We think failure to prove the allegation with reference to the authority of the Grand Jury to act is likewise fatal. This is especially true in the instant case where the Government relied upon it in order to escape facing the issue tendered by the motion to quash.
>
> "The position of the Government leads to the inevitable result that a Grand Jury may, with impunity, exceed the limitation which Congress has definitely and plainly placed upon its authority, to act at a succeeding term. Furthermore, its unauthorized acts are not subject to challenge and the Government can never be called upon to make proof that the Grand Jury has proceeded in compliance with law. When confronted with a motion to quash or plea in abatement, it relies upon an allegation of the indictment. When the latter is placed in issue by the defendant's plea, it offers no proof in support of the allegation, and the only excuse for its failure to do so is that the court takes judicial notice. There may be room for contrariety of opinion as to the precise manner in which the authority of a Grand Jury should be challenged, but we doubt if any will contend that the Government can wholly evade the challenge as has been done in the instant case. Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment."

The Government, as we have said, having petitioned your Honors in the *Johnson* case (Docket Nos. 799 and 800), the record in that case is now before your Honors. Your Honors will perceive that the record in the *Johnson* case

and the case at bar are practically identical as to certain errors held to be fatal in the *Johnson* case and held by the Circuit Court of Appeals not to exist in the case at bar.

Improper Cross-Examination of Petitioner.

The prosecutor took your petitioner back (R. 283) to 1898 and inquired where he lived each year and his business, how long he knew Mongoven and if Mongoven was not in the slot machine business (R. 283, 311-312). How much Doc Williams received in salary (R. 284), how long he knew Laird, Chief of the County Police (R. 285), and how often he saw him, and where (R. 311), when he started buying saddle horses (R. 286) and about a barn built in 1939 and 1940. What the business of the horse buyer was formerly. About showing horses. About the business Al Cohn was in (R. 288). How often the lawyers, Brodkin and Bieber, were at the junk yard, and if Brodkin and Bieber didn't represent the bookies in town who were arrested. How he allowed Marcus to take title to some property years ago, in 1935, without any profit to your petitioner, and if Marcus didn't make bail bond for bookies (R. 292). If Wells was not out apologizing to your petitioner for telling the Government the truth (R. 294). If it was not Captain Harrison's duty to enforce the law as to handbooks and how often your petitioner saw Captain Harrison. About the gambling in defendant's saloon in 1898 (R. 295). Why his saloon was closed by the Mayor in 1916 (R. 296, 297). About the purchase of a home in 1904 (R. 303) and the amount of the mortgages, and if there had been a foreclosure and if the receiver had put your petitioner out of the property, and if the Mills Novelty Company didn't obtain a judgment against your petitioner in 1910 for $200 (R. 304), and if your petitioner didn't do business with the Mills Novelty Company. If your petitioner purchased the Waukegan Post in 1939 for 90 or 100 thousand dollars (R. 313) and if your petitioner didn't buy the Bon Air

Country Club. It will be necessary, of course, to study the record to see that this cross-examination was prejudicial and improper. Your petitioner denied all of the charges made upon collateral issues, and no effort was made by the Government to rebut your petitioner's denial.

It is respectfully contended that the prosecutors overstepped legal bounds in cross-examination and introduced collateral and remote matters with the sole purpose of prejudicing your petitioner in the eyes of the jury.

Your Honors will see from the record that Blocker and Matteson, two revenue agents, investigated your petitioner, and a settlement was made in 1932. Also that in 1936 revenue agents called your petitioner in and questioned him about the source of money expended by him for farms. Your petitioner told the agents (R. 142) that the money spent was from his savings. Your petitioner made his position clear in his affidavit filed in support of his challenge to the array (R. 54). Your petitioner said that he feared that collateral issues would be dragged into the case and he would be improperly discredited as a witness. We respectfully submit that all of the fears expressed by your petitioner proved to be well founded, for when your petitioner took the stand as a witness in his own behalf the prosecutor launched a smear campaign under the guise of cross-examination. We shall point to a few examples shown by the record.

We respectfully quote from the record (R. 296):

"The Witness (your petitioner): I was in the saloon business then, but I might not have been. I didn't sell the saloon at Lake and Robey, I had to close it up. (This was in 1916.)

"Mr. Hurley (Assistant United States Attorney): Q. Why?

"Mr. Stewart: Object, your Honor.

"The Court: He may answer.

"Mr. Stewart: Your Honor, may I be heard just a moment?

"The Court: Yes.

"(Whereupon the following conversation was had outside the hearing of the Jury:)

"Mr. Stewart: That is the time when he (the defendant) had difficulty with the police, and they wouldn't allow him to run. That has nothing to do with this case here, showing another offense.

"The Court: Is that your objection?

"Mr. Stewart: Yes.

"Mr. Woll: We are just asking questions.

"The Court: Be sure to keep away from that.

"Mr. Woll: We are just asking the questions.

"The Court: I understand.

"Mr. Stewart: I am telling what the answer will be.

"Mr. Woll: We can't help what the witness answers.

"Mr. Stewart: Yes, you can.

"Mr. Woll: We can ask our questions.

"The Court: You may ask questions, but stay away from that.

"Mr. Woll: He is a witness for all purposes.

"The Court: I understand and you understand what the rule is. He may answer the question.

"(Whereupon the following proceedings were had in the hearing of the Jury:)

"(Your Petitioner:) A. Mayor Thompson took the license away.

"Mr. Stewart: I move to strike it, your Honor.

"The Court: It may stand."

We respectfully submit that this was improper cross-examination and prejudiced your petitioner in the eyes of the jury, and that the court erred in overruling the objections and in not allowing the motion to strike.

Mr. Hurley asked your petitioner if the Mills Novelty Company didn't obtain a judgment for $200 against your petitioner in 1910 (R. 304). After an objection was overruled, your petitioner said he knew of no such judgment.

Your Honors will remember that Clifford testified that it made no difference what your petitioner had prior to 1919,

at which time Raber said your petitioner was broke. If there ever was a judgment for $200, as stated in the question, the prosecutors didn't prove it, and we fail to see its materiality. Surely, any such judgment could easily have been collected in view of the real estate holdings of your petitioner. Your Honors know that if the judgment had existed it would have interfered with the real estate dealings conducted by your petitioner. Anyhow, it is obvious that it had no place in the case except when the prosecutor was trying to improperly link your petitioner with the slot machine business. It is common knowledge that the company referred to manufactures and sells slot machines.

This same anxiety on the part of the prosecutor crops up again, as appears from the cross-examination concerning Mongoven (R. 311), wherein Mr. Hurley insinuated that Mongoven had something to do with slot machines. We quote (R. 312):

> "Mr. Hurley: He (defendant) said that he (Mongoven) was in the slot machine business. I want to know what end of it. There are a lot of angles to the slot machine business.
>
> "Mr. Stewart: What is the difference?
>
> "Mr. Hurley: It makes a lot of difference. I want to find out what he knows about it. Here is a fellow out there every week end. I don't think we should be limited.
>
> "The Court: You have been given great freedom, Mr. Hurley."

Your Honors will notice that the court reminded the prosecutor that he had been given great freedom. It is our respectful contention that the record shows that the court permitted the District Attorney to violate all known rules, to the prejudice of your petitioner.

We respectfully submit that the rule "*res inter alios acta*" forbids the introduction of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute (22 Corpus Juris Secundum, sec. 602, p. 926).

When Mr. Hurley failed to get what he wanted from your petitioner about Mongoven, and Louis Witt was shown to have no information, Mr. Plunkett (Assistant District Attorney) supplied the prejudicial material by testifying in his closing argument, as follows (R. 371):

> "Mr. Plunkett: You know who Leo Mongoven is. Your petitioner himself told you he is in the slot machine racket up in Lake County, and according to your petitioner himself, they play golf together every Saturday. Golf and what else? He didn't tell you what else but Louis Witt told you what else. They not only played golf, they are playing double solitaire with a shoe box full of money and Skidmore saying we will take care of you."

Here again, we respectfully submit, the prosecutor distorted and misquoted the evidence. Your Honors can search the testimony of your petitioner in vain for any evidence that Mongoven was in the "slot machine racket." There is no such evidence, and if there were, it had no relevancy. Mongoven was not even a witness in the case.

Next we call attention to the cross-examination of your petitioner relative to a newspaper (R. 313). Your Honors will note that Mr. Hurley asked your petitioner if he did not spend money on a newspaper in 1939. After your petitioner said no, the prosecutor followed this with specific questions about the Waukegan Post and insinuated by questions that between 90 and 100 thousand dollars was expended by your petitioner in this manner. Your Honors see again that after the court expressed some doubt as to its competency and indicated a limit, the prosecutor went right ahead, in disregard of the court's ruling. There was no evidence offered or introduced about any newspaper, and it is fair to infer that the Government had no such evidence. The prosecutor was merely reminding some of the jurors that they may have read somewhere in the newspapers that your petitioner owned the Waukegan Post. When Mr. Plunkett told the jury in argument that the jury

knew who Mongoven was, we respectfully submit that Mr. Plunkett referred to newspaper accounts about Mongoven.

The question asked by the prosecutor about the horses (R. 286) was not idle curiosity. We respectfully submit that the Government attorney was endeavoring to prejudice your petitioner with the jury.

The record shows that Brodkin and Bieber are lawyers, and questions implying that they represented bookies (R. 290) show the purpose of the prosecutor. Although the court sustained our objection and your petitioner said he did not know if Brodkin and Bieber represented bookies, we respectfully submit that the harm was done. We respectfully submit that it is improper, on cross-examination, to attempt to discredit the witness by sneers and innuendo, or insinuation and imputation (70 Corpus Juris, WITNESSES, sec. 1012, p. 809).

Your petitioner purchased the Division Street property in 1923 (R. 291, 292, 293). It had nothing to do with this case. The prosecutor, by his questions, insinuated that Marcus signed bonds for bookmakers, culminating in this question (R. 293):

> "Mr. Hurley: Q. As a matter of fact Marcus is running that bond business for you, isn't that right?
> "Mr. Stewart: I object, your Honor.
> "The Court: He may answer. You may answer.
> "The Witness: A. No, I haven't a dollar's worth of interest in it."

The prosecution made no effort to prove by evidence that your petitioner owned the business conducted by Marcus or that any profit was derived therefrom. If it be a fact that Marcus signed bonds for bookmakers, such fact, we respectfully submit, was immaterial. The prosecutor contented himself with the insinuation made in the question.

We respectfully submit that it is not permissible under the guise of testing the credibility of a defendant to ques-

tion him on cross-examination about matters not touched on in the examination in chief, and the sole tendency of which is to prejudice the defendant in the eyes of the jury (70 Corpus Juris, sec. 824, p. 665).

This misconduct upon the part of the prosecutor, as we have respectfully noted, is comparable to the misconduct condemned in *Berger* v. *U. S.*, 295 U. S. 78. *Little* v. *United States*, 93 F.^{2} 401, 408; citing *Lennon* v. *United States*, 20 F.^{2} 490, 494, *Glover* v. *United States*, 147 Fed. 426, *Havener* v. *United States*, 15 F.^{2} 503, *Gideon* v. *United States*, 52 F.^{2} 427, *Hartzell* v. *United States*, 72 F.^{2} 569. "And when indulged in the government will not be heard to say that such cross-examination is not prejudicial error." *Salerno* v. *United States*, 61 F.^{2} 419, 424; *Allen* v. *United States*, 115 F. 3, 11; *Gideon* v. *United States*, 52 F.^{2} 427.

We respectfully quote from *Singer* v. *United States*, 58 F.^{2} 74, 77:

> "Innocent men may be indicted and convicted and guilty men may be acquitted, but both good and bad men are alike entitled to the application of the rules of evidence which courts throughout the ages have found to be best for the fair and impartial administration of the law."

We quote from the argument (R. 373):

> "Mr. Plunkett (Assistant United States Attorney): In considering whether he wilfully left this off his tax return you must consider the kind of man he is and the kind of income it was and I say to you in a few words when a man who would sit out in that junk yard and collect extortion money from gambling all over the City of Chicago and Cook County and by doing that break down the fibre of law in this county, disrupt and corrupt the police and law enforcement of Cook County, would such a man hesitate for one second to cheat his Government out of every nickel he could take from it. You know the answer. You know the answer to that. He wouldn't hesitate and he didn't hesitate."

The honorable Circuit Court of Appeals said (herein, p. 86):

> "Appellant further contends that the court erred in permitting him to be cross-examined relative to matters immaterial to the issue before the court. It is quite true that many of these questions might tend to reflect upon his character, at least by innuendo. We think that the answers sought are pertinent and are well within the realm of his previous admissions. By testifying he tendered his character and reputation as a direct issue, and the court is granted much latitude in this respect. We think its discretion was not abused."

With all due respect, we submit that the honorable Circuit Court of Appeals could not have given such short dismissal to our serious charge against the prosecution, if the honorable Circuit Court of Appeals had not overlooked the record (R. 296).

We respectfully submit that the record shows improper cross-examination which prejudiced your petitioner in the eyes of the jury; that the trial court erred in overruling the objections and in not allowing the motion to strike; and that the honorable Circuit Court of Appeals erred in not correcting the error.

If and when this petition is allowed, we expect to respectfully point out the error of the court in permitting the prosecutor to cross-examine the defendant concerning the Mills Novelty Company, about Mongoven, Brodkin & Bieber, Marcus and the Waukegan Post.

The honorable Circuit Court of Appeals said (herein, p. 87), concerning the cross-examination complained of:

> "Indeed, much of it related to other crimes not described in the indictment, which were State crimes over which the Federal court had no jurisdiction."

Surely, this Honorable Court will not agree that a defendant may be asked about suspected irrelevant State

crimes over which the Federal court has no jurisdiction, merely because the Federal court has no jurisdiction. We respectfully submit that the question of federal jurisdiction is not involved, and its mention only tends to confuse.

Improper Conduct of Prosecutor.

We respectfully submit that the prosecutor improperly prejudiced the rights of your petitioner by stating his personal belief as to the guilt of your petitioner in argument. All of the closing arguments are shown in the record (R. 358 to 410). We respectfully quote from that which we respectfully claim to constitute reversible error (332):

> "Mr. Woll (United States Attorney): I represent the Government, and as long as I represent the Government, there never will come a time when I have to hold my head in shame and tell you one thing, that I never believed myself. I believe in this case; I know this man is guilty from that evidence on the witness stand, I say this evidence has proved him guilty."

Then Mr. Plunkett (Assistant United States Attorney) threw in his opinion, as is shown by the following (R. 363):

> "Mr. Plunkett: The second computation was based on the statement he made on June 23, 1936, before the revenue agents. They said to him, Mr. Skidmore, how much were you worth in 1928? He replied, I think I was worth $300,000. All right, *I don't think he was.* The evidence doesn't show he was, and the Government doesn't contend that he was. We say he was not."

It was said in *Beck* v. *United States*, 33 F.^{2} 107, that a criminal trial is a serious effort to ascertain the truth in which studied efforts to arouse passion and prejudice constitute misconduct which cannot be countenanced (*Nations* v. *United States*, 32 F.^{2} 598). And in *Read* v. *United States*, 42 F.^{2} 636, it was said that the prosecuting attorney had a duty to assist in giving a fair trial to a de-

fendant. See also *Taliaferro* v. *United States*, 47 F.2 699, *Hale* v. *United States*, 25 F.2 430, and *Volkmor* v. *United States*, 13 F.2 594.

The honorable Circuit Court of Appeals dismisses our respectful contention with but one sentence (p. 9, herein, p. 87):

> "We have read the arguments of counsel, and we are convinced that they are not fairly subject to this criticism."

Then the honorable Circuit Court of Appeals says (herein, p. 87):

> "It is only fair to say that neither appellant nor his counsel raised any objection to the argument until long after the verdict was returned, when it was too late to reserve an exception."

Turning to the record (R. 411), your Honors will find the following:

> "Mr. Stewart: The prosecutor has no right to express his belief."

It is true, of course, that we did not object every time the prosecutor violated his oath and deliberately appealed to prejudice and passion. We still respectfully insist that the honorable Circuit Court of Appeals has overlooked the prejudicial effect of the conduct of the prosecutor throughout the trial (*People* v. *Bimbo*, 314 Ill. 449, 453). We respectfully submit that that which was said by the honorable Circuit Court of Appeals in the *Johnson* case is also applicable in the case at bar. We respectfully quote from the opinion in the *Johnson* case (herein, p. 109):

> "A person reading the record, without knowledge of the charge, could reasonably conclude that the defendants were tried on the latter offense" (gambling).

Confusion as to Verdicts.

It is our respectful contention that neither verdict should be permitted to stand. After the indictments were consolidated for trial, the case stood just as if there were but one indictment containing six counts (*Gozner* v. *United States*, 9 F.^{2} 603). So the first verdict returned was not proper, as it did not respond to the issues and did not dispose of the entire case (23 Corpus Juris Secundum, sec. 1388, p. 1067).

In *Allen* v. *State*, 52 Ala. 391, it was held that the court should have refused to take the verdict, which was a nullity. The jury should pass upon the entire indictment. This verdict found only part of the issue the jury were empaneled to try. It was said in *Commonwealth* v. *Parker*, 294 Pa. 144, 143 A. 904, 907:

> "In Pennsylvania, however, in the absence of a statute so providing, we do not permit jurors to render piecemeal verdicts; all their conclusions must be comprehended in a single verdict."

In *United States* v. *Watkins*, Fed. Cas. 16649, 28 Fed. Cas., pp. 419, 478 (3 Cranc. C. C. 441), it was held that if the jury bring in a verdict, not answering to the whole matter in issue, the court, without recording it, will inform the jury that they may retire again to reconsider their verdict. The recorded verdict not answering all of the issues was set aside.

In *United States* v. *Keen*, Fed. Cas. 15510, 1 McLean 429, it was held that where the jury have omitted to find on one of the counts, the court may permit such count to be discontinued but the verdict cannot be amended as to enter a not guilty on such count. So in the case at bar the verdict as to No. 32125 is defective as not being responsive to the issues.

We respectfully submit that when the judge sent the jury back, the jury had the power to reconsider the first count (No. 32125) (*Straw* v. *State*, 197 Ind. 606, 151 N. E. 695). And so when the jury returned the second time with

guilty as to 1936, 1937, and not guilty as to 1933, 1934 and 1935, the second verdict was silent as to 1938, so it was an acquittal as to 1938, or it too was defective as not being complete (*State* v. *Snipes*, 185 N. C. 743, 117 S. E. 500).

We respectfully submit that where a jury returns a verdict of not guilty the court has no authority to require the jury to bring in another verdict finding accused guilty (*Woodham* v. *State*, 178 So. 464, 28 Ala. App. 62).

Where the jury, on discovering a mistake in the verdict, are allowed to retire again, the recordation of the verdict in regard to which the mistake occurred is not conclusive (23 Corpus Juris, Secundum, CRIMINAL LAW, secs. 1413, 1415, pp. 1112, 1113). Where an insufficient verdict is legally declared and entered, it is binding on the court (23 Corpus Juris, Secundum, CRIMINAL LAW, sec. 1415, p. 1113).

In *Owens* v. *State*, 40 Ga. A. 508, 150 S. E. 455, the jury brought in a verdict finding the defendants guilty as to the first count and not guilty as to the second count. The court declined to accept the verdict and stated to the jury that it was repugnant. The court sent the jury back and they returned with a verdict of guilty as to both counts. Sentences were entered and the court endeavored to correct its own error by vacating the sentence as to the second count. We quote (456):

> "The error which brought about the situation is harmful, and there is no cure for it but the grant of a new trial."

In the Federal courts it is improper for the judge to ask the jury during their deliberations how they stand numerically on the question of conviction (23 Corpus Juris, Secundum, CRIMINAL LAW, sec. 1380, p. 1058, citing *Brasfield* v. *United States*, 272 U. S. 448; *Spaugh* v. *United States*, 77 F.^{2} 720; *Berger* v. *United States*, 62 F.^{2} 438; *Weiderman* v. *United States*, 10 F.^{2} 745).

Applying this principle, we respectfully submit that the trial court in the case at bar had no right to inquire

as to how the jury stood upon one count. As soon as that inquiry was made and the information was given in open court before the deliberations of the jury were completed, prejudice should be presumed according to the principle of the above cited cases. The jury should have been discharged. It is respectfully submitted that under the circumstances no verdict could be properly sustained.

The jury acquitted as to 1933 to 1935 inclusive. The circumstantial evidence case required the jury to believe that the defendant was without funds in 1919 and that the money expended by him came from subsequent income. By rejecting this theory and acquitting for these first years the jury, in order to have been consistent, should have acquitted for 1936, 1937 and 1938.

We respectfully submit that the honorable Circuit Court of Appeals has overlooked the effect of the order of consolidation. After the indictments were consolidated, there were not two indictments any more, just numerous counts in one indictment.

The honorable Circuit Court of Appeals said (herein p. 89):

> "Appellant contends that a return of the verdict in the first indictment discharged the function of the jury as to both cases and that the second verdict constituted a second jeopardy of appellant as to the other indictment. We think there is no merit in this contention."

It will be noted that the honorable Circuit Court of Appeals regards the indictments as separate. We respectfully refer your Honors to our brief (p. 169), with the respectful suggestion that the honorable Circuit Court of Appeals has failed to pass upon our entire contention.

If your Honors determine that the writ should issue, we expect to respectfully demonstrate further that the so-called trial of your petitioner was but a mockery of justice.

Respectfully submitted,

Wm. Scott Stewart,
Counsel for Petitioner.

APPENDIX I.

Constitutional and Statutory Provisions Involved.

Amendment V. to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI. to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U. S. C. A., Title 26, sec. 145 (b), p. 537:

> Any person required under this title to collect, account for and pay over any tax imposed by this title, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

U. S. C., Title 28, Sec. 411 (Judicial Code, sec. 275):

> Jurors; qualifications and exemptions. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

U. S. C., Title 28, sec. 412 (Judicial Code, sec. 276):

> Same; manner of drawing. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.

Illinois Revised Statutes (1939), c. 78, sec. 1:

> The county board of each county shall at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct in the county, giving the place of residence of each name on the list, to be known as a jury list.

Illinois Revised Statutes (1939), c. 78, sec. 25:

> The said commissioners upon entering upon the duties of their office, and every four years thereafter, shall prepare a list of all electors of each sex between

the ages of 21 and 65 years, possessing the necessary legal qualifications for jury duty, to be known as the jury list. The list may be revised and amended annually in the discretion of the commissioners. The name of each person on said list shall be entered in a book or books to be kept for that purpose, and opposite said name shall be entered the age of said person, his occupation, if any, his place of residence, giving street and number, if any, whether or not he is a householder, residing with his family, and whether or not he is a freeholder.

APPENDIX II.

Opinion in case at bar filed October 31, 1941. Rehearing denied December 4, 1941 (R. 486). (Not yet reported.)

Before Evans, Sparks and Major.

Sparks, *Circuit Judge.*

Appellant was charged by two grand jury indictments with unlawfully, willfully and knowingly having attempted to defeat and evade portions of his income taxes in violation of section 145(b), Title 26 of the U. S. Code. The first, returned on September 1, 1939, contained five counts, which dealt respectively with taxes for the calendar years 1933 to 1937, both inclusive; the second, returned February 29, 1940, dealt with taxes for the calendar year 1938.

To each of these indictments the defendant filed what he termed a verified plea in abatement, in which he merely sought to quash each indictment for the following reasons: As to the first indictment he alleged that it was returned on September 1, 1939, by an alleged grand jury which was impaneled and sworn in June, 1939;

that no facts pleaded showed jurisdiction in the grand jury to return the indictment,

or that the grand jury was legally selected or was continued by an order of the court authorizing the June grand jury of that year to sit in a succeeding term,

and that there was no evidence heard by the grand jury at the June term, 1939, touching the matters referred to in the indictment.

The alleged reasons for quashing the second were practically the same, but for the variation of the applicable dates.

Appellant further alleged that it was not pleaded in the second indictment that it was returned by the regular panel of the December term, 1939, or by any other grand jury sitting at that term—it appearing of record in this court that during the December term, 1939, there was sitting, in addition to the regular grand jury of the December term, another or second grand jury which had been impaneled at that term, both of which were sitting and acting at one and the same time.

The District Attorney moved to strike each plea in abatement, or motion to quash, for the reasons that neither contained sufficient allegations of fact to support the motions, but on the other hand each contained mere conclusions of appellant with no supporting allegations of fact, and was merely an attempt to contradict the record in each case, and for the further reason that each plea failed to state the source of information upon which appellant's assertions were founded. The court sustained these motions and struck the pleas.

Each indictment discloses that the grand jury involved, on its own motion, was authorized to continue to sit during the term in question for the purpose of finishing investigations already begun.

Each indictment alleges that the investigation was begun but not finished at the respective terms at which the juries were authorized to continue their investigation.

Under these conditions there was no error in the court's striking these motions to quash.

Moreover, a motion to quash, like a demurrer, will not test the truth of an allegation.

Every allegation of appellant in these pleas merely constituted a denial of specific allegations in the indictments.

Such an issue might well constitute a basis for a plea in abatement, and the court quite properly set these pleas for hearing on a future date.

On that date no evidence was introduced, or offered, other than that we have already stated.

Upon these facts it would have been error to sustain the motions to quash, and the court did not err in dismissing the pleas.

To each of these indictments appellant moved for a bill of particulars, which the court denied.

In all material instances he called for calculations based upon appellant's books of account which were in his own possession.

From these it would seem clear that he could easily calculate his receipts and expenditures and thus ascertain the true amount if any for which he was liable for taxation.

If, on the other hand, the Government was in error as to its calculations, it would have been a simple matter for appellant to show those errors by the inspection of his own books.

The general rule is that particulars such as these will not be furnished when the one seeking them is in possession of the means of ascertaining them.

Moreover, in case of such motions the court is clothed with considerable discretion in making its orders. We think that discretion was not abused in this case.

On December 4, 1940, the two indictments were consolidated for trial on motion of the United States Attorney, and without objection of appellant; and at that time they were set for trial on February 20, 1941. On the last-named date, appellant gave notice that on February 24, at the opening of court, he would appear and move to quash the indictments and also challenge the array of petit jurors. On that date he appeared, and by leave of court withdrew his plea of not guilty. The court thereupon gave him leave to file instanter a motion to quash the indictment.

That motion was argued and overruled by the court;

thereupon appellant moved for a list of Government witnesses, which was denied, whereupon he moved for leave to inspect the minutes of the grand jury, which was also denied. He further moved to waive his trial by a jury. This was likewise denied, and he thereupon entered his motion to inspect the list of petit jurors, which was granted. He then upon arraignment pleaded not guilty and the trial proceeded.

In the motion to quash the two indictments appellant requested the court to consider it without prejudice to any of the motions heretofore made in the causes, "begging leave to demur, both general and special."

The reasons assigned in support of the motions to quash are many.

One charges failure of jurisdiction of the grand jury and is said to be supported by the content of the so-called plea in abatement hereinbefore referred to, and by appellant's argument thereon.

Others allege that no crime or offense is charged in either of the indictments,

and others charge that the indictments are not clearly drawn and consist of conclusions instead of facts,

or are uncertain by reason of the use of the videlicet,
or are multifarious,

or in one way or another are not sufficiently clear to inform the accused of the nature of the crime with which he is charged.

It would serve no good purpose to lengthen this opinion by discussion of each of these items.

A study of them convinces us that the grand jury had jurisdiction and that the crime was sufficiently charged to inform appellant of the offenses complained of.

We think he was not deprived of the rights given to him by the sixth amendment of the Federal Constitution,

nor are we convinced that the Act is unconstitutional because, as alleged, it fixes no standard of guilt.

Appellant further contends that it is not clearly stated in the indictment whether he attempted to evade or defeat the tax, or just failed to pay it.

He further urges that the nature of the charges and the consolidation of the cases for trial resulted in prejudice to him.

We think there is no merit in these contentions.

The general form of this indictment has been approved by this court many times. *Capone* v. *United States*, 56 F. 2d 927; *Guzik* v. *United States*, 54 F. 2d 618; and *O'Brien* v. *United States*, 51 F. 2d 193.

A further reason alleged for quashing the indictments was that the grand jury was not properly selected and sworn and the conduct of the inquiry was not in accordance with law.

This specification is attempted to be supported by the affidavits of appellant and one Caplow.

The main contention in this respect is that, in proportion to population, there were fewer jurors drawn from the city of Chicago and its environs than from other parts of the federal judicial district in which the case arose.

It was stated in effect that it was manifestly unfair for the citizens of Chicago to be compelled to submit to trial before a jury predominated by citizens living outside the city, whose manner of living and moral concepts might be very different from those living within the city limits.

Such suggestion does not merit serious consideration.

There is not one scintilla of evidence in this case to support the charge that the grand jury or the petit jury was illegally or unfairly drawn, or that the inquiry was illegally or unfairly conducted, or that the appellant was thereby harmed.

The court committed no error in overruling the motions

to quash. See *Ruthenberg* v. *United States*, 245 U. S. 480; *Seadlund* v. *United States*, 97 F. 2d 742.

The jury found appellant guilty upon the second indictment and upon the fourth and fifth counts of the first indictment. It found him not guilty upon the first, second and third counts of the first indictment.

Appellant contends that there is no evidence to support any of the guilty verdicts.

The evidence disclosed that he was engaged in the junk business for many years prior to the return of the indictments.

As early as the year 1919 he stated that he had no money or assets.

He never filed a tax return until the year 1933, and he gave for his reason for not having filed such returns that he had not made any money during that time.

As a result of the examination then being conducted by the revenue agents, he made delinquent returns for the years 1929, 1930 and 1931.

He then paid taxes and penalties of $9200 upon income for those years from the junk business and certain unidentified bank deposits.

As proof of his statement to the examiners that he had received no other property, he voluntarily disclosed the contents of his safety deposit box to them, in which were found only private personal papers, and no assets other than evidence of title to real estate.

During the time covered by these indictments, appellant bought large amounts of valuable real estate and made extensive improvements upon them.

The evidence further discloses that during these times he sold "protection" to those who desired to engage in the "handbook" business.

Many witnesses testified that they went to his junk yard and personally handed him sums ranging from $50 to $200 in currency, and received permission from him to open handbook establishments.

They thereafter paid him a sum, fixed by him, each month so long as they operated the handbook business.

When calling at his office for that purpose, they found many men in line waiting to be admitted to his office.

When admitted each remained but a very brief time and

retired. When the witnesses were admitted they handed the money to appellant. He noted it on a paper and they retired.

Appellant testified in the case and made no effort to explain what became of this money, because he denied receiving any of it.

The aggregate amount of the money thus received was considerable, and appellant never returned any of it for taxation.

This testimony of the bookmakers was evidently believed by the jury.

It was purely a question of fact and we are bound by the finding on it.

It was properly admitted in evidence, not for the purpose of showing that appellant was guilty of other crimes, but as tending to show that he actually received from that source vast sums of income with which he is charged in these indictments.

If he did not retain for his own use all the money which he thus received he could have so informed the jury.

However, he denied receiving any of it. He is therefore in no position to insist that the Government prove that he did not divide it with others.

The method by which the agents arrived at their conclusions with respect to his income for the years in question was as follows: They ascertained that his expenditures for those years were greatly in excess of his reported cash receipts, including borrowed money, and they charged him with failing to return for taxation the excess of such receipts over his expenditures.

He insisted at all times that these excessive expenditures were taken from prior accumulated savings, but this statement was in direct conflict with his prior statements to which we have referred, and other of his statements to which we shall presently refer.

Hence, there was raised a question of fact for the jury to determine.

The calculation of the revenue agents for the years 1936, 1937 and 1938 showed an excess of expenditures over his reported income in the respective amounts of $33,095.49, $117,580.44, and $94,097.67.

These figures do not include such items as living expenses for the appellant, which he estimated at $6500 a year, or

the sum of $14,000 which he admitted having paid for a saddle horse, nor do they include the cash on hand which appellant had as of December 31, 1938, which amount he refused to state or even to estimate within $100,000, although he admitted having easily $25,000.

Furthermore, this calculation does not reflect the net income and tax paid for each of the years in question.

It may be further said that this calculation also assumes that the defendant's cash position was nothing on January 31, 1933, which fact is supported by appellant's own evidence.

The Government's agents computed appellant's cash position as of January 1, 1929, to be $140,000.

He had told them in 1936 that he was worth not less than $300,000 in 1928.

At that same time he estimated his Chicago real estate at a present value of $172,000.

The record discloses that this property was all bought prior to 1928, except one piece which was bought in 1936 for $13,000.

Appellant had title to all of this property at the time of the trial and had never sold any of it.

These figures are quite conclusive as to the Government's calculations as to his cash position on January 1, 1929.

To this amount the Government added the total amount of his reported income following the date of January 1, 1929, until the end of the year 1938, which was $304,169.89. It was found appellant had available for expenditures during that time a total of $444,169.89. But during that time he spent $794,289.64, which exceeded his cash by $350,-119.75. This, of course, was as the record shows, computed individually by years, and appellant was given credit for his cash on hand on January 1, 1929.

It was assumed that the expenditures in excess of the reported income from 1934 to 1938 properly measured appellant's taxable income for the respective years in which the expenditures were made.

It is not necessary to set forth these figures as the computation is not controverted, and appellant was given credit for all income reported by him in his returns in 1929 and 1931.

Another computation was made by the Government based on appellant's statement on June 23, 1936, that his esti-

mated net worth then was $500,000, of which $250,000 was represented by former holdings.

His cash position at that time, as he said, was $73,000, and the rest of his net worth was represented by real estate.

Since these statements were made by appellant in June of 1936, which was in the middle of the taxable year, it was assumed, for the purpose of giving appellant the strongest cash position on December 31, 1936, that all the cash income shown on his income tax return for that year was that earned subsequent to the date of June 23, 1936, and that all repayments of loans and all farm expenses were incurred and paid prior to that date.

This computation discloses that appellant's cash position in December 31, 1936, was $100,706.32. He reported income for that year at $64,586.69. However, he expended during that same year $184,167.13.

The same method was pursued by the Government in the calculation of unreported income as to each year involved in both indictments.

However, we are not directly interested in the calculations for the years 1933, 1934 and 1935, because the jury found him not guilty of the charge with respect to those years. Appellant did not materially dispute the accuracy of the calculations.

He merely insisted that the excessive expenditures for each of the years were made from accumulated earnings in previous years. This contention is so utterly inconsistent with the undisputed calculations and with appellant's own statements, that the jury had a right to disbelieve his contention, and he is in no position to complain.

The evidence was sufficient to support the verdict.

Appellant further contends that the court erred in permitting the witness Clifford to answer certain questions which he insists invaded the province of the jury.

This witness was an accountant of many years experience in the Internal Revenue service. In this respect he had qualified as an expert witness.

In each question put to him he was asked to assume certain facts which were supported by evidence.

For instance,—he was asked to assume that for the year 1933 appellant's expenditures exceeded his reported receipts by $66,164.74.

He was then asked to assume that this amount was taxable income to appellant for that year.

He was then asked to state upon those facts whether there would be a tax due the United States from appellant in excess of the amount shown on his income tax return for that year.

Such questions were quite proper and the province of the jury was not thereby invaded.

There was no error in permitting the questions to be answered.

Appellant further urges that the court erred in permitting the witness Leake to testify that he had paid Skidmore $500 as protection money for his policy wheel in 1932. The objection was based on the fact that this was a year prior to the first year covered by the indictment.

In this there was no error.

It was not only proper to show willful intent but also to show that he had a source of income which he had concealed from the taxing officers.

The courts have many times held that willful intent is one of the essential elements in the proof of the crime of evasion of income taxes. *Malone* v. *United States,* 94 F. 2d 281.

It is further contended by appellant that the court erred in restricting the cross-examination of the witnesses Blocker and Raber. It is clear from a reading of this testimony that the answer sought by the questions was not germane to the subject matter of the direct examination. The rulings were proper.

Appellant further contends that the court erred in permitting him to be cross-examined relative to matters immaterial to the issue before the court.

It is quite true that many of these questions might tend to reflect upon his character, at least by innuendo.

We think that the answers sought are pertinent and are well within the realm of his previous admissions.

By testifying he tendered his character and reputation as a direct issue, and the court is granted much latitude in this respect. We think its discretion was not abused. *Raffel* v. *United States,* 271 U. S. 494.

Appellant contends that the court erred in permitting the introduction of collateral issues and in further permitting

the Government's counsel to comment on them in his argument and to draw unreasonable inferences therefrom, much to his detriment and prejudice.

The testimony thus complained of was elicited by cross-examination.

It bore directly upon the credibility of the witness thus testifying, including appellant.

Indeed, much of it related to other crimes not described in the indictment, which were state crimes over which the federal court had no jurisdiction.

However, they were matters which did affect the credibility of the witness, and they were quite properly admitted.

Appellant under this heading also complains that the court did not permit him to ask his witness Healey whether Government witness Drell had been arrested for gambling. This was for the purpose of impeaching Drell, who appellant insists had denied it.

The court was clearly right in sustaining an objection to this question.

It not only exceeded the limits of the cross-examination and was purely collateral, but if admitted, the answer would not have affected his character, because a mere arrest furnishes no presumption whatever of guilt.

Under the heading of "collateral issues," appellant further contends that the court erred in permitting counsel to make reference to such collateral issues in his argument to the jury, and to make unwarranted inferences therefrom to the detriment and prejudice of the appellant.

We have read the arguments of counsel, and we are convinced that they are not fairly subject to this criticism.

It is only fair to say that neither appellant nor his counsel raised any objection to the argument until long after the verdict was returned, when it was too late to reserve an exception.

Other objections to the admission and rejection of evidence are raised, but they are quite similar to those we have mentioned, and we think they do not merit discussion. The court did not err in any of these rulings.

In support of his contentions herein, appellant seems to rely quite heavily upon the opinion of this court in cases 7500 and 7501, against William R. Johnson, *et al.*, decided by this court September 15, 1941.

It is only fair to say that the decisions in those cases are not in point here.

There was not one controverted question in those cases which is present here, and this was admitted by counsel in argument before us.

Appellant further contends that the court erred in the following instruction to the jury:

"With respect to the years prior to 1929, it is presumed that the defendant has complied with the provisions of the Internal Revenue Laws and has filed a return and paid his income tax in such of those years when he had a net income subject to tax. Evidence that he did not file a tax return for any of these prior years may therefore be considered by you as an admission by him that he did not have a net income in excess of the amounts for which he would have been required by law to have filed a tax return."

Appellant contends that this instruction constituted reversible error for the reason that he was not charged with any crime for the years prior to 1933.

Of course this is true and the court so told the jury in the later instructions.

When the instructions are read together it is found that there is no inconsistency in this respect.

Moreover, it could not have prejudiced appellant in any way, for the verdict of guilty covered only the years of 1936, 1937 and 1938.

Other objections to instructions are made but they are all of the same character, and when all instructions are read together there seems to be no basis for the objection. Appellant stresses, however, his objection to the court's refusal to give an instruction which he requested, to the effect that, "where a conviction for a criminal offense is sought upon circumstantial evidence alone, the prosecution must not only show, by a preponderance of the evidence and beyond a reasonable doubt, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused." We think the court fully and accurately instructed the jury upon the subjects of direct and circumstantial evidence and that its instructions substantially covered that requested by appellant. Moreover, all of the evidence in this case was not by any means

circumstantial, and we think the court did not err in this respect.

It is further contended by appellant that the court erred in receiving the verdicts.

The facts are that the jury returned a verdict in cause number 32125, and found appellant guilty as charged. The court received the verdict and inquired of the jury as to the prospects of their agreement upon the other indictment. The foreman said that he thought that they would not be able to agree, even after further deliberation. Over appellant's objections the court ordered the jurors to retire for further deliberation.

Subsequently, the jury returned a verdict on indictment number 31770, and as stated found appellant guilty as charged in the fourth and fifth counts, and not guilty as charged in the first, second and third counts.

Appellant contends that a return of the verdict in the first indictment discharged the function of the jury as to both cases and that the second verdict constituted a second jeopardy of appellant as to the other indictment. We think there is no merit in this contention. See *United States* v. *Cotter*, 60 F. 2d 689; and *United States* v. *Frankel*, 65 F. 2d 285.

Judgment

AFFIRMED.

APPENDIX III.

Opinions in Johnson Cases Nos. 7500, 7501.

(123 F.2 111.)

Before EVANS, SPARKS and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* These appeals are from a judgment, entered on the verdict of a jury, finding the defendants guilty of a wilful attempt to evade the payment of income taxes, and of conspiracy to defraud the United States. The appellant in No. 7500 is William R. Johnson, and the appellants in No. 7501 (sometimes herein referred to as "co-defendants") are Jack Sommers, James A. Hartigan, John M. Flanagan, William P. Kelly and Stuart Solomon Brown. The indictment contains five counts, the first four of which charge Johnson with evasion of income taxes for the years 1936, 1937, 1938 and 1939, and are predicated upon Section 145 (b), Title 26, U. S. C. A. As to the offenses alleged in these counts, the co-defendants (appellants in No. 7501) are charged as aiders and abettors. The fifth count charges all defendants with a conspiracy to defraud the United States of income taxes. Section 88, Title 18, U. S. C. A.

In addition to the appellants in No. 7501, a number of others were charged as aiders and abettors. As to such others, the charge was nolle prossed as to William R. Skidmore, William Goldstein, Orrie Alexander and Bernice Downey. A verdict of not guilty was returned as to Andrew J. Creighton, Edward Wait and Reginald E. MacKay.

The trial commenced August 17, 1940, and the verdict of the jury was returned October 12, 1940. As might be expected in a trial of this duration, many complicated and difficult questions, both legal and factual, were presented. Many errors are here assigned which it is contended require a reversal of the judgment. After a lengthy and careful consideration of the voluminous record and briefs, we have reached the conclusion that the contention must be sustained. It would be impractical to consider all the errors assigned or contentions made by the respective parties, and we shall, therefore, discuss only those which we regard as of controlling importance.

The contested issues revolve largely around: (1) The

denial of certain preliminary motions, (2) that the verdict of the jury is not supported by substantial, competent evidence, (3) the admission of improper evidence, (4) the improper examination and cross-examination of witnesses, (5) the improper and prejudicial remarks of the prosecutors, and (6) the denial by the court to include in its charge to the jury certain requests made by the defendants.

At the threshold of our consideration, we are confronted with the troublesome question arising from the court's denial of certain preliminary motions, pleas and demurrers invoked by the defendants. On May 16, 1940, there was filed on behalf of the defendant Johnson, what was entitled a motion to quash the indictment, and on the same date there was filed on behalf of the other defendants what was entitled a plea in abatement in the nature of a motion to quash. Both the motion and the plea attacked for substantially the same reasons, the legality of the Grand Jury which returned the indictment. The defendants also filed a motion for rule on the Government to reply to such plea and motion, which was by the court denied. The Government filed a motion to strike the motion and plea as being insufficient in law, which motion was allowed.

The attack upon the Grand Jury was upon the ground that it was without jurisdiction for the reason that the indictment was returned at a term of court subsequent to that at which it had been originally empaneled, without compliance with the Statute in that respect.

The Grand Jury was empaneled for the December 1939 Term.[1] This term continued until the first Monday in February; the February Term until the first Monday in March, and the March Term until the first Monday in April. The indictment was returned March 29, 1940, during the March Term.

On January 24, 1940, during the December 1939 Term, the Grand Jury was authorized, by order entered on that date, to sit during the February 1940 Term to finish investigations begun but not finished at the December Term. No question is raised but that this was a valid order and

1. The Terms for the District Court of the Eastern Division of the Northern District of Illinois are fixed by Statute, (28 U. S. C. A. Sec. 152) to be held on the first Mondays in February, March, April, May, June, July, September, October and November, and the third Monday in December.

that the Grand Jury was legally continued from the December to the February Term.

The motion by Johnson to quash (the same may be said of the plea in abatement on behalf of other defendants) alleged that the indictment, returned at the March Term in the year 1940, was without warrant or authority of law for the reason that an order entered February 28, 1940, purporting to authorize the continuance of the Grand Jury from the February to the March Term was void. This order, as alleged in the motion, is as follows:

> "Now comes the Second December Term 1939 Grand Jury for the Northern District of Illinois, Eastern Division, by Dorothy W. Binder, Forewoman, and in open Court requests that an order be entered authorizing them, the said Second December, 1939 Grand Jury, heretofore authorized to sit during the February 1940 Term of this Court, to continue to sit during the Term of Court succeeding the said February Term of Court, to-wit, the March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court; and the Court being fully advised in the premises,
>
> "It Is Therefore Ordered That the Second December 1939 Grand Jury, now sitting in this Division and District, be, and it is hereby authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing said investigations."

This order, so it was alleged, was predicated upon a petition of the Grand Jury filed February 28, 1940, praying for a continuance order "* * * to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Term of this Court, and which said investigations cannot be finished during the said February 1940 Term of said Court."

The motion to quash as to the first, second and third counts of the indictment alleged that on March 1, 1940, the same Grand Jury returned an indictment against the defendant Johnson, charging the same crimes, matters and violations as are contained in the first, second and third counts of the instant indictment, and that—

> "* * * the matters contained in the first, second

> and third counts of the present and instant indictment were finished and concluded at the February 1940 Term of the said Grand Jury; * * *"

As to counts four and five, it was alleged that "no investigation of said matters was begun at the December 1939 Term," and "the investigation of said matters was first begun at said March 1940 Term of Court." It is the contention of the defendants that the order of continuance was not in compliance with Section 421, Title 28, U. S. C. Supp. This provision, so far as now material, provides:

> "* * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: * * *"

No question is raised by the Government but that compliance with this provision is essential in order to give a Grand Jury vitality subsequent to the term at which it is originally empaneled. Moreover, in view of the fact that all inferior courts of the United States are of limited jurisdiction and possess only such power and authority as are expressly conferred, no question could well be raised in this respect. As was said in *In re Mills, Petitioner,* 135 U. S. 263, 267:

> "* * * A grand jury, by which presentments or indictments may be made for offences against the United States, is a creature of statute. It cannot be empanelled by a court of the United States by virtue simply of its organization as a judicial tribunal. * * *"

If a court is without authority to empanel a Grand Jury except as the same is expressly conferred by Statute, it would seem to follow inevitably that a Grand Jury empaneled could only have its authority or power continued to a subsequent term by strict compliance with the statutory provision. The language of the provision plainly limits the authority of the court to continue a Grand Jury to sit "during the term succeeding the term at which the request is made," and with equal clarity limits the continuance "solely to finish investigations begun but not finished by such Grand Jury."

It is contended by the defendants that the order of February 28, 1940, authorized the December Grand Jury to

finish investigations begun during the February 1940 Term when, under the statute, the court had the power only to authorize it to finish investigations begun at the December Term. The Government disputes that the order of the court can be thus construed, but does not argue the question. The language "to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms of this court" leaves no room for argument but that the March Grand Jury was authorized to continue investigations begun at its February Term, as well as those begun at the December Term. It is equally plain that by reason of the statutory limitation, the court was without power to confer upon the Grand Jury authority to continue investigations begun at its February Term. The Government does not dispute—in fact, it, in effect, concedes—the soundness of this proposition.

The Government, however, in undertaking to meet the situation, relies upon an allegation of the indictment which purports to allege continuance of the Grand Jury, in conformity with the statute. (This allegation was attacked by demurrer as shown hereinafter). It is contended that by reason of this allegation, the question as to whether the Grand Jury was illegally continued to the March Term for the purpose of continuing an investigation begun at the February Term is academic. Reliance upon this allegation, in our judgment, places the Government in a precarious, if not fatal, situation. We are unable to discern how an illegal order of continuance can be cured or even aided by an allegation in the indictment to the effect that the Grand Jury was legally continued. The Government had an opportunity to answer the allegations of the motion to quash, but instead, entered a motion to strike, which was allowed. By such motion a legal question was presented which must be determined from the averments of the motion to quash.

In our view there can be no escape from the attack made upon the court's order except by blindly holding that the phrase "to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms" is valid as to the former and void as to the latter. We have been favored with no authority and we are unable to find any which would permit such a construction.

The Government also contends that by reason of the order of January 24, continuing the December Grand Jury to the

February Term for the purpose of continuing any investigations begun at the December Term, that the Grand Jury at the February Term had no authority to begin any new investigation. Undoubtedly this is true, but we are unable to perceive how this furnishes any support for the order of February 28.

We are not greatly impressed with the defendants' argument that the Grand Jury was precluded from continuing an investigation during the March Term merely because of the fact that it, on March 1, (February Term) returned an indictment against Johnson charging the same violations as were charged in the first, second and third counts of the instant indictment. True, a Grand Jury has no authority to continue an investigation which has been finished at a preceding term. While the return of an indictment might be an indication that the investigation was finished, we do not think it is conclusive. We see no reason why a Grand Jury is precluded from continuing an investigation after the return of an indictment, and subsequently again indict for the same offense.

The motion to quash with reference to the fourth and fifth counts of the indictment makes the direct allegation that the investigation of the matters therein charged was first begun at the March Term and that no such investigation was begun at the December Term. The fourth count charges the defendant Johnson on to-wit, March 15, 1940, with an attempt to defeat and evade his 1939 income tax (other defendants charged as aiders and abettors). One of the means alleged is the filing of an erroneous return on March 15, 1940. Other means are alleged, not material to the instant question. The fifth count charges all the defendants with a conspiracy from a period commencing about January 1, 1936, up to and including the return of the indictment. It appears that much of the discussion concerning these counts is interwoven with that in connection with the demurrer. It is the contention of the defendants that the offense charged in the fourth count was committed, if at all, on March 15, 1940. We think this is correct—in fact, the count so alleges. It is then argued that no investigation could have been begun prior to the date of the commission of the alleged offense, and therefore, not until the March Term. The Government takes issue with this contention and argues that the Grand Jury investigates facts, not offenses. It is pointed out that the Grand Jury was investigating Johnson's income for the years 1936 to 1938 inclusive, and could not avoid hearing

facts which related to the same question for the calendar year 1939.

There is some plausibility in this argument in view of the fact that each of the first four counts charges the same offense except for different years. It has been held, however, and we think correctly so, that an attempt to evade income tax is a separate offense for each year. *United States* v. *Sullivan*, 98 F. (2d) 79, 80. In *United States* v. *Miro*, 60 F. (2d) 58, 61, the court said:

> "* * * A tax could neither be evaded nor attempted to be evaded if it was not due; if, by the terms of the statute, there is no tax due in a particular case, there is no 'tax imposed by this act' to evade or defeat. * * *"

It appears to us that the language of the Statute "solely to finish investigations begun" must have reference to a legal investigation of an offense which has been committed. A Grand Jury is not a conservator of the peace. So far as we know, it has no authority to investigate offenses which it anticipates may be committed in the future. The mere fact that the Grand Jury had discovered evidence of tax evasion for previous years would give it no authority to presume that the same offense would be consummated in a later year. The fact that it heard testimony relative to offenses committed in previous years which might at some later time become relevant to an offense committed in the future, does not, in our judgment, sustain the argument that it could have begun an investigation as to such future offense. We think it is different with reference to the conspiracy count which was a continuing offense, an investigation of which the Grand Jury might have commenced at its December Term.

Our discussion so far has been predicated upon our conclusion that the order of February 28, 1940, was void. If our conclusion in this respect be erroneous, it would not follow that the allowance of the motion to strike the motion to quash could be sustained. As pointed out, the motion as to the first, second and third counts expressly averred, as a matter of fact, that the investigations of the offenses charged in those counts "were finished and concluded at the February 1940 Term of the Said Grand Jury" and as to counts four and five, the averment was made that the investigation as to offenses therein charged was not "begun at the December 1939 Term of court" and was "first begun at said March 1940 Term of court." Assum-

ing that the court entered a valid order of continuance, which we have decided to the contrary, the Grand Jury, according to the averments of the motion to quash, failed to comply with such order. We think it is plain that a Grand Jury, legally continued, has no authority to continue an investigation except one begun at its original term and not finished either at the original term or an intervening subsequent term. The Government answers the argument as to these averments, by informing us as to the common practice of Grand Juries "engaged in a broad field of inquiry." This may be the most available answer, but legally it is a fiasco.

In defense of the Grand Jury proceeding, the Government relies upon a decision of this Court, *Elwell* v. *United States,* 275 Fed. 775. While it does not expressly so contend, we assume it infers, by reason of what was said in that case, that the Grand Jury may be considered as *defacto.* While we are loath to repudiate a holding of our own court, we are of the view that there is no such thing as a *defacto* Grand Jury in a Federal Court. In the Elwell case, the court cites *People* v. *McCauley,* 256 Ill. 504, 509, which, it is true, recognizes such a Grand Jury. The latter court expressly points out, however, that a Circuit Court of Illinois has general and original criminal jurisdiction, with common law power to call or continue a Grand Jury. Its authority is not dependent upon Statute. A United States District Court, on the contrary, is of limited jurisdiction with such powers only as are expressly conferred. A Grand Jury is "a creature of Statute." *In re Mills, Petitioner, supra.* Furthermore, the Elwell case was decided previously to the enactment of the amendment of Section 421 *supra,* which expressly limits the authority of the court to continue a Grand Jury. It affords no assistance in the instant case.

We are not unmindful of the rule invoked by the Government that pleas in abatement and those of a kindred nature must be strictly construed. Facts must be stated, not conclusions. Here, however, the allegations were direct and positive. It is difficult to see how they could have been more specific. The challenge went to the very heart of the authority of the Grand Jury to act. The Government's motion to strike should have been overruled and the Government required to answer. The defendants were entitled to an opportunity to offer evidence in support of the motion and plea. *Carter* v. *Texas,* 177 U. S. 442, 447.

Finally the Government relies upon Section 556, Title 18, U. S. C. A., which provides in substance that no indictment, trial, judgment or other proceeding shall "* * * be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This provision is not applicable—the question presented is one of substance and not of form. *Crain* v. *United States,* 162 U. S. 625, 644.

In view of the importance of the case, the time consumed in its preparation and trial, as well as the expense relative thereto, we are reluctant to pronounce the action of the court as reversible error in striking the motion to quash and the abatement plea. We are forced to the conclusion, however, that there is no escape from such a pronouncement. As was said in *Crain* v. *United States, supra,* 625, 644:

> "* * * Nor ought the courts, in their abhorrence of crime nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear, affirmatively, from the record that every step necessary to the validity of the sentence has been taken. * * *"

Notwithstanding that our conclusion in this respect requires a reversal of the judgment, we think it is proper to express our views concerning some of the other issues presented. Demurrers were filed to the indictment by all defendants attacking its sufficiency on numerous grounds, one of which is the alleged insufficiency of the allegation with reference to the continuance of the Grand Jury. The indictment in this respect alleged:

> "* * * having begun but not finished during said December Term of Court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court in and for said division and district during the February and March Terms of said Court for the purpose of finishing investigations begun but not finished during said December Term of Court, pursuant to request of the United States Attorney and upon motion of the Grand Jury, * * *"

The argument concerning this allegation naturally is interwoven to a considerable extent with that concerning the

motion to quash. The most serious criticism is that it failed to allege that the investigation was not finished at the February Term. It does allege, however, that the investigations were begun but not finished during the December Term, and that the Grand Jury was continued to the February and March Terms for the purpose of finishing such investigations. It could not well have been continued to the March Term for the purpose of finishing an investigation which had been finished at the February Term. While the allegation is not as certain as good pleading requires, yet we think it may be reasonably construed to exclude the thought that the investigation was finished at the February Term.

It is also asserted that the allegation is only contained in the first count of the indictment and even if sufficient, it has no application to the other counts which failed to incorporate the allegation by reference or otherwise. We do not believe this position is tenable. As we read the indictment, the allegation is part of what may be termed the preamble and specifically refers to the "matters charged in this indictment," which we think makes it applicable to all counts alike. It is argued that according to this allegation, only one order of court was entered continuing the December Grand Jury during the February and March Terms. True, the word "order" is used in the singular when it should have been in the plural, but we are not disposed to hold the allegation insufficient for that reason.

The fourth count of the indictment alleged the offense to have been committed on March 15, 1940. It is again argued that an investigation of this offense could not legally have been begun at the December Term, 1939. We have heretofore considered and sustained the validity of this argument. It follows that the demurrer, for this reason, should have been sustained as to the fourth count.

It is also urged that, assuming the sufficiency of the allegation with reference to continuance, the judgment must be reversed for the reason that no proof was offered in its support. While this question, of course, is not raised by demurrer, it is so closely related to our discussion concerning the continuance matter that it appears appropriate to consider it at this point. The Government makes no answer to the contention unless it be that the court takes judicial notice of its orders in support of jurisdictional allegations. How far the court may go in this respect we need not decide for the reason that such notice would have disclosed the Grand Jury was continued to the March Term,

illegally as we have held, "to finish investigations begun but not finished * * * during the said December 1939 and the said February 1940 Term of this court." It is apparent that judicial notice of this order would not have supported the allegation. In fact, we have sustained the allegation because it is in substantial conformity with the statutory provision rather than the court's order. If the allegation was essential, as we think it was, it would seem equally essential to support it with proof. Failure to have proved venue, no doubt, would have been fatal to the judgment. We think failure to prove the allegation with reference to the authority of the Grand Jury to act is likewise fatal. This is especially true in the instant case where the Government relied upon it in order to escape facing the issue tendered by the motion to quash.

The position of the Government leads to the inevitable result that a Grand Jury may, with impunity, exceed the limitation which Congress has definitely and plainly placed upon its authority, to act at a succeeding term. Furthermore, its unauthorized acts are not subject to challenge and the Government can never be called upon to make proof that the Grand Jury has proceeded in compliance with law. When confronted with a motion to quash or plea in abatement, it relies upon an allegation of the indictment. When the latter is placed in issue by the defendant's plea, it offers no proof in support of the allegation, and the only excuse for its failure to do so is that the court takes judicial notice. There may be room for contrariety of opinion as to the precise manner in which the authority of a Grand Jury should be challenged, but we doubt if any will contend that the Government can wholly evade the challenge as has been done in the instant case. Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment.

We now return to a further discussion of the demurrer. It is contended that various allegations of the indictment are inconsistent and duplicitous. The first four counts are the same, or substantially so, except as to dates and amounts. We shall discuss the first, and what is said will be equally applicable to the second, third and fourth. The count charges, in the language of the statute, that the offense was committed on to-wit, the 15th day of March, 1937. It alleges facts disclosing that Johnson was required on or before March 15, 1937, to file a return of his income for the calendar year 1936. There is set forth

what purports to have been his actual income and tax which he should have paid, as well as his reported income and the tax paid. The latter is substantially less than the former. As a means of committing the offense, it is alleged that the return was made under oath March 12, 1937, and filed March 15, 1937. As a further means, it is alleged that Johnson "did conceal and cause to be concealed from any and all proper officers of the United States, his gross and net incomes aforesaid, and the sources of said gross and net incomes and the sources thereof; * * *"

The main contention of Johnson is that inasmuch as no date is alleged as to the time of concealment, a continuing offense is charged. There is some ground for this contention when viewed in connection with a subsequent allegation as to the co-defendants (afterwards discussed). We are of the opinion, however, that this allegation can be reasonably construed as referring to March 15, 1937, the date of the offense as alleged. It is also argued by Johnson that the allegations with reference to the filing of the return and of concealment constitute a violation of Section 145 (a) and are, therefore, duplicitous. We do not believe there is any merit in this contention. We see no reason why the matters required or forbidden by that paragraph may not be utilized and alleged as a means of committing the offense defined by Section 145 (b).

As to the co-defendants, the count presents a serious and, we think, fatal situation. Following the allegations as to Johnson, to which we have referred, it is alleged that—

> "* * * during the calendar year 1936 and up to and including March 15, 1937, and continuously thereafter up to and including the date of the filing of the indictment * * * (all co-defendants named) did * * * wilfully and knowingly aid, abet, conceal, induce, and procure the said defendant William R. Johnson, * * * to attempt in the manner aforesaid to evade and defeat the income tax aforesaid. * * *"

Thus the co-defendants are charged with a continuous offense from a period during 1936 up to March 27, 1940, the date of the return of the indictment. While the offense against Johnson and the means employed in connection therewith are charged as of March 15, 1937, the co-defendants as aiders and abettors are charged with an offense which extended over a period of years. This allegation against the co-defendants is so utterly inconsistent with

those against Johnson that it, in our opinion, invalidates the indictment as to them. The conclusion seems inescapable that the charge against the aiders and abettors could be no broader than that against the principal. Furthermore, we are of the view that the statutory provision upon which the indictment is predicated does not define a continuing offense, nor does it define an offense which can be committed prior to the date on which the taxpayer is required to file his return. As was said in *United States* v. *Miro, supra,* page 61:

> "* * * A tax could neither be evaded nor attempted to be evaded if it was not due. * * *"

and as said by this court in *O'Brien* v. *United States,* 51 F. (2d) 193, 196:

> "* * * There could, however, be no such prosecution for a willful attempt to evade or defeat a tax unless there was some tax due from the taxpayer. * * *"

In addition, as pointed out by the co-defendants, they are charged as accessories both before and after the fact. It is argued that such an allegation is bad for duplicity in view of Section 550, Title 18, U. S. C. A., by which an accessory before the fact is made a principal and punished as such, while under Section 551, an accessory after the fact can only be punished to the extent of one-half of the maximum imposed upon the principal. The question thus presented has not been decided, so far as we are aware. The Government endeavors to meet the contention by arguing that Section 551 entitled "Punishment of Accessories" is solely for the guidance of the court in pronouncing sentence. It relies upon certain cases,[2] none of which is in point. These cases go no further than to hold that by Section 550, the distinction between principals, accessories and accomplices has been abolished and that an accessory or accomplice may be charged and punished as principal. It does not follow, as contended here, that the distinction between an accessory before and after the fact has been abolished, nor does the language of Sections 550 and 551 justify such a construction. The Government's position leads to the result that a defendant may be charged and tried without knowledge as to whether a conviction will subject him to the punishment provided for a principal or the lesser punishment provided for an

2. *Ruthenberg* v. *United States,* 245 U. S. 480; *Mullaney* v. *United States,* 82 F. (2d) 638; *Madigan* v. *United States,* 23 F. (2d) 180; *Collins* v. *United States,* 20 F. (2d) 574.

accessory after the fact. Without information as to whether the jury considered his connection with the offense as having been prior or subsequent thereto, the court, for the purpose of imposing punishment, must determine in which capacity the defendant acted. We are unable to agree with the Government's contention in this respect. We do not believe a defendant can properly be charged in the same count as an accessory, both before and after the fact.

The fifth count charges all defendants with a conspiracy extending from January 1, 1936, to the time of the filing of the indictment, to defraud the United States of income taxes due from Johnson for the years 1936 to 1939, inclusive. The allegations of counts one, two, three and four, so far as they refer to Johnson, are included by reference. The conspiracy alleged was to the effect that Johnson was engaged in the gambling business and that in order to prepare the way for the making by him of false and fraudulent returns, the defendants would conceal from the Revenue Officers the investment, participation and true ownership of Johnson in numerous gambling houses and enterprises in Cook County and Chicago, Illinois, by operating them under names other than his. Twenty-five of such houses were named. It was further a part of the conspiracy to establish and operate currency exchanges where the proceeds from the gambling houses could be converted into currency in such a manner as to conceal the source, ownership and disposition thereof. It was also alleged that the defendants would file and cause to be filed false and fraudulent income tax returns by Johnson. As in the substantive counts there was set forth what purported to be the true income of Johnson for each of the years in question, and also the income as returned for each of those years. Numerous overt acts are alleged.

We need not discuss the numerous questions raised by the defendants as to this count. It charges a continuing offense which, in itself, is an answer to most of the criticism as to its validity. *Skelly* v. *United States*, 76 F. (2d) 483, 488.

We have already held that the fourth count was subject to demurrer as to all defendants. We now hold that the demurrer as to counts one, two and three should have been sustained as to the co-defendants. As to the defendant Johnson, the demurrer was properly overruled as to counts one, two, three and five, and as to the co-defendants properly overruled as to count five.

By motion for directed verdict at appropriate times, the question of the sufficiency of the evidence to sustain the verdict was preserved. It is here argued earnestly and at length that there was no substantial, competent evidence in support of the verdict. In view of the fact that the case must be reversed, we shall attempt to do little more than briefly refer to the theories advanced by the respective parties, and the general character of testimony in support thereof.

Johnson admittedly was a professional gambler and had been for many years. If he had any other business of consequence, the record does not disclose it. He was not just an ordinary gambler, but one of towering stature among that fraternity. The co-defendants were also admittedly in the same business. They operated brazenly and notoriously, and, so far as this record discloses, without interference or restraint during the period covered by the indictment. That the field was a fertile one is evidenced by the huge sums of money which apparently passed through their hands. It is of prime importance, however, to keep in mind that they were not charged with the violation of any law prohibiting gambling, or the operation of gambling houses. Neither were they charged with a failure to file income tax returns at the time required by law. Such returns were filed by Johnson, as well as by the co-defendants, and the Government received income tax for each of the years in question in substantial amounts. For the calendar year 1936, Johnson's return showed a net income of $161,892, upon which he paid a tax of $71,915; for the year 1937, a net income of $248,660, upon which he paid a tax of $128,399; for 1938, a net income of $101,946, upon which he paid a tax of $34,530, and for 1939, a net income of $251,715, upon which he paid a tax of $130,430. Substantially all the gross income disclosed by these returns was from his gambling operations.

An accountant for the Government computed Johnson's actual income for the year 1936, at $547,942; for the year 1937, $1,047,129; for 1938, $935,353, and for 1939, $961,504.

The Government sought to sustain the charge that Johnson failed to report all of his taxable income for the years 1936 to 1939, inclusive, on two distinct theories:

(a) By undertaking to prove that he owned a group of gambling houses operated in and about Chicago and that all the checks cashed, money deposited and currency exchanged by persons operating these

gambling houses were income from these gambling houses, and therefore that the aggregate of these banking transactions was taxable income which was in excess of the amount of net income which he reported; and

(b) By offering proof that he expended in said years more cash than he had available for spending, according to the income reported.

Each of the co-defendants except Brown was the operator of one or more gambling houses named in the indictment. Brown was the manager of the Lawrence Avenue Currency Exchange which handled funds and checks brought to it from various gambling houses. The total amount of money and checks handled by this and other exchanges and banks for the respective years, was, according to the Government's contention, the income of Johnson for such years.

This theory necessarily is predicated upon the premise that Johnson was the sole owner and proprietor and entitled to all the income from such houses. The soundness of the theory must be tested by the premise upon which it is constructed. This basic proposition the Government sought to establish by circumstantial evidence. The circumstances relied upon, in a general way, were proven by witnesses who were patrons, or who were minor employees of the various gambling houses, to the effect that Johnson frequently visited such houses, talked with persons who were in charge, exercised influence in the hiring of some of the employees, exercised certain control over the policies of operation, that the same group of workmen did construction and maintenance work at several of the gambling houses, that certain bus service was provided by the same company to serve the places, that the same accountants served Johnson and the other defendants in the preparation of their income tax returns, that large quantities of $100 bills were taken by the operators of the several gambling houses in cashing checks and exchanging currency, and that Johnson used large quantities of bills of the same denomination in paying the purchase price and for improvements on properties owned by him or in which he was interested. Johnson denied that he owned any of said gambling houses, or that he had any interest in the banking transactions, and offered evidence to show that

the gambling houses were owned respectively by certain of those named in the indictment as co-defendants.

We have carefully examined the testimony on this theory of the Government's case and we are of the opinion that, considering it in the light most favorable to the Government, as we must do, the most that can be said is that the proof discloses Johnson had an interest in the gambling houses. The evidence does not show that he was the sole owner and therefore entitled to all the proceeds. The Government's contention on this theory of the case must rest upon the assumption that he owned the entire interest in the houses; that the total of all the business transactions at the currency exchanges and banks represented income from such houses, and that such income was paid to Johnson. It is not claimed that there is any proof that Johnson actually received this income. Such fact, if it be a fact, must be inferred from the other assumptions which we have mentioned. As already stated, Johnson reported a large income from his gambling transactions for each of the years in question, and to say that his interest in the gambling houses was such as to entitle him to an income greater than that reported is to indulge in rank speculation. If Johnson had reported no income for those years, a different situation would have been presented. We have no hesitancy in holding that the verdict can not be supported upon this theory.

On the expenditure theory, however, the case is more favorable to the Government. This theory was sought to be established by proving a statement purported to have been made by Johnson on January 1, 1932, that he had cash on hand in the amount of $78,000. Thereafter, his income, as disclosed by his returns and his expenses, was shown year by year. The expenses, as shown by the Government from 1932 to 1939, were greatly in excess of his income for the same period. Admittedly, under this theory, the proof failed to establish the charge as to the year 1936. His income as reported for that year, plus what he had on hand at the beginning of the year, exceeded his expenditures by more than $184,000. For the year 1937, however, his expenditures exceeded his income by $106,000; for 1938, by $367,000, and for 1939, by $151,000. True, there is a dispute as to many of the items involved in these calculations, and as to some of them, a serious dispute. We are of the opinion, however, that the proof of his income on

this so-called expenditure theory was sufficient to present a jury question. As the proof on this theory, however, does not support the charge as to the year 1936, (count one) Johnson's motion for a directed verdict as to that count should have been allowed. As to the other counts, it was properly denied.

The motion for a directed verdict on behalf of the co-defendants should have been allowed as to counts one, two, three and four. What we have said heretofore concerning the nature of the offense charged is largely determinative. The charge against Johnson was not a continuing one and the offense, if committed, was by the filing of a false return on the 15th day of March of each year. There is no evidence and no contention that the co-defendants had anything to do with the preparation of these returns or that they had any knowledge or information as to their contents. Acts performed and statements made by them before the commission of the offense by Johnson are not sufficient to justify their conviction as aiders and abettors. We need not stop to inquire what distinction there is, if any, between aiders and abettors and a conspirator, for the reason that the case was presented on the theory that there was a distinction. It was so recognized in the indictment and throughout the trial. The evidence which the Government relies upon indiscriminately to establish the charge in the substantive counts, and the conspiracy count, however, was sufficient to require submission to the jury upon the latter charge. As to this count, therefore, the motion for a directed verdict was properly denied as to all defendants.

The defendants severely criticize a large amount of evidence admitted against them. After a study of the record in this respect, we are not convinced that any of it, with the exception later referred to, is such as to require a reversal. In a case of this character, much must be left to the discretion of the trial court. A large part of the evidence complained of was proper as to the conspiracy count, but improper as to the substantive counts. The fact that it is not relevant as to the latter does not require its exclusion as to the former. Typical of such evidence was the income tax returns filed by the co-defendants for the years covered by the indictment. They were properly admissible, we think, under the conspiracy count but should have been limited thereto. We are unable to see how they were

material against any of the defendants as to the other counts. On the other hand it is difficult to see how their admission was harmful. In fact, it is our view that if they had any effect, they were beneficial to the defendants rather than harmful. These returns disclose a substantial income on the part of the co-defendants who, according to the Government's theory, were mere employees of Johnson in the operation of various gambling houses. The amount of income reported indicates that such co-defendants had an interest in such houses rather than that they were mere employees of Johnson as contended. It would therefore seem that they had no prejudicial effect.

Another line of testimony, properly subject to criticism in our opinion, was that given by scores of witnesses as to every conceivable detail concerning the operation of gambling houses. Some of this was relevant to the contention that Johnson was the owner and operator of the houses. On the other hand much of it was wholly irrelevant to any issue in the case. A glaring example of such testimony was given by the witness Spankeren. He testified as having gambled at some of the houses mentioned in the indictment. After losing $16,000, he quit gambling. A law suit was filed by his mother-in-law against a number of persons, including the defendant Johnson and co-defendants Sommers and Hartigan, apparently under a Statute authorizing recovery of losses sustained at gambling. The suit was settled with a lawyer representing Sommers for $1000, and the promise of a political appointment. It appears to be the Government's theory that this evidence proves ownership by Johnson. There is nothing to connect him with the incident, however, except the fact that he was named as a defendant in the suit. There is nothing to indicate that he had anything to do with settling the law suit or that he paid or promised anything for a settlement. This testimony did not prove, or tend to prove, ownership. The most that can be said is that it tended to show that the mother-in-law must have thought Johnson had an interest in the gambling house as he was made a defendant. By the same token, however, she must have thought that all the other defendants likewise had such an interest. Some of the testimony complained of pertained to gambling houses with which the defendants were not shown or claimed to have had the slightest connection. A great amount of time was consumed in prov-

ing that gambling houses operated upon a large scale. This was irrelevant to any issue in the case, especially in view of the fact that the Government did not rely upon losses sustained by individual patrons in determining Johnson's income. There was no issue in the case as to the occupation of Johnson or the co-defendants. By Johnson's tax returns, he had disclosed an enormous income from gambling operations, and the returns of the co-defendants disclosed substantial incomes. The offense charged was evasion of income tax—not gambling or operating gambling houses. A person reading the record, without knowledge of the charge, could reasonably conclude that the defendants were tried on the latter offense. There is room for argument that the admission of such testimony in wholesale quantities was prejudicial. To what extent this may be true, we need not decide. It must be remembered that the defendants were admitted gamblers engaged in the operation of gambling houses on a large scale. It would seem they are not in a very good position to complain of that part of the testimony which merely disclosed the magnitude of their operations.

We shall now refer to the testimony given by one Frank J. Clifford who testified for the Government, purportedly as an expert witness. It is contended by the defendants that his testimony invaded the province of the jury. On the other hand the Government contends that he testified in response to proper hypothetical questions. He qualified as an expert accountant and that he had been in the employ of the Government as a Revenue Agent for five years. So far as material to the question now under consideration, he first testified that the amount of currency delivered to the Lawrence Avenue Currency Exchange between the months of July, 1938, and September, 1939, was $1,289,000. So far as is shown by the bill of exceptions contained in the record, he then, of his own volition, stated:

> "I have made an analysis and computation based on Governments exhibits (naming over 400 exhibits) and other evidence in the record to determine the amount of net cash income reported by the defendant William R. Johnson for the years 1932 to 1939, inclusive."

He was asked to state the amount, and after doing so, volunteered the statement that he had made a computation of Johnson's expenditures for the years 1932 to 1939, inclusive. In response to a question he gave the result

of such computation and again volunteered that he had made a computation as to the excess of expenditures over net cash income for the same period of time. In response to a question, he gave the result of such computation. He then volunteered the statement:

> "With the exhibits just a moment ago enumerated, and the other evidence in the record, I have made a computation to determine the total amount of gross income of the defendant Johnson for the calendar year 1936."

The examination of this witness (omitting the numerous objections by defendant's counsel) proceeded as follows:

> "Q. What is the amount, from your computation, of the gross income of the defendant Johnson for the calendar year 1936, according to your computation?
>
> "The Court: You are making reference to those exhibits and the evidence in the record?
>
> "Mr. Hurley: He used those as a basis for his computation.
>
> "The Court: Overruled.
>
> "The Witness: $547,942.38.
>
> "I am able to state the amount of tax still due by the defendant Johnson to the United States for the calendar year 1936, after allowing credit for the amount of tax shown on defendant's tax return for the year as shown by Government's Exhibit R-10, in evidence.
>
> "Q. And what is the total amount of tax still due the United States, according to your computation, for the year 1936?
>
> "The Witness: $268,041.09."

Without a question the witness stated—

> "I have made a computation based on the list of exhibits which you have read to me and the other evidence in the case to determine the total amount of Johnson's net income for the calendar year 1937.
>
> "Q. What is that amount?
>
> "The Witness: $1,047,129.77."

Again, without being questioned, he stated:

> "I am able to state the amount of tax still due by Johnson for the calendar year 1937, after allowing

credit for the amount of tax shown on Johnson's return for that year.

"Q. And what is the total amount of tax still due to the United States, according to your computation for the calendar year 1937?

"The Witness: $588,064.20."

The same character of question was propounded and the same character of response made as to Johnson's net income and tax due the Government for the years 1938 and 1939. It will be noted that the witness was not asked to assume anything. It is not necessary to refer to his cross-examination in determining the propriety of his examination in chief. It plainly discloses, however, that he decided in favor of the Government all the controverted issues upon which his answers were predicated.

Proper and specific objections were interposed by the defendants and overruled. The mere recitation of the questions propounded and answers given by this witness demonstrates their gross impropriety.[3] He was permitted to examine hundreds of exhibits, consider "all the evidence in the case" and testify as to each of the years in question the amount of Johnson's net income and tax due thereon. In arriving at his factual conclusions, he necessarily was required to weigh the testimony on many conflicting points and to decide all controversies in favor of the Government. After this testimony the jurors were no longer required to think. The vital issues concerning which they had heard testimony for weeks had been determined and decided.

In support of its argument that Clifford's testimony was proper, the Government cites and relies upon a number of cases in which hypothetical questions have been approved.[4] There is little dispute among the authorities as to when and in what form a hypothetical question is proper. As was said by this court in the Guzik case, supra, page 620:

"* * * Certainly a hypothetical question may be deemed safe from ultimate attack where there is evi-

3. *United States* v. *Spaulding*, 293 U. S. 498, 506; *Dexter* v. *Hall*, 82 U. S. 9, 26; *Wilkes* v. *United States*, 80 F. (2d) 285, 291; *United States* v. *Stephens*, 73 F. (2d) 695, 704.

4. *Travelers Ins. Co.* v. *Drake*, 89 F. (2d) 47, 50; *Gleckman* v. *United States*, 80 F. (2d) 394; *Guzik* v. *United States*, 54 F. (2d) 618, 620; *City of Port Washington* v. *Thacher*, 245 Fed. 94, 96.

> dence tending to prove all the facts assumed and it includes all the material facts which the evidence tends to prove and which bear upon the subject with regard to which the expert is asked to express an opinion."

The reason an answer to such a question does not invade the province of the jury is aptly stated in *Travelers Ins. Co.* v. *Drake, supra,* page 50:

> "* * * The truth of facts assumed by the hypothetical question as within the probable range of the evidence, as a basis to support the hypothetical question, is a question of fact for the determination of the jury to find with the other submitted facts upon a fair submission of the issue, and it must determine whether the basis upon which the hypothetical question rests has been established. * * *"

None of the cases relied upon by the Government has any application to the instant situation for the reason that by no stretch of the imagination can the questions be treated as hypothetical. Not a single question by which the objectionable answers were elicited contains any assumption or hypothesis. In fact, some of his testimony was voluntarily given. It follows that the jury was not permitted to pass upon the validity or soundness of the premise upon which the answers were based. Thus the essential element of a hypothetical question, by which it is saved from invading the province of the jury, was eliminated. In oral argument before this court, counsel for the Government, in effect, conceded that after the testimony of this witness there was nothing left for the jury to decide except the truthfulness of his testimony.

The Government contends that the cases cited by the defendants are inapplicable for the reason that "none of them involves the type of case which we are concerned with, namely an income tax prosecution." We are unaware, however, of any reason or authority by which a different rule should be applied because of the character of the case. That a proper hypothetical question could have been framed and propounded, we do not doubt. That such was not the case is so plainly and conclusively demonstrated as to admit of no dispute. We are of the view that the testimony of this witness, going to the very heart of the controverted issue and invading the province of the jury as it did, was so prejudicial and damaging that it alone would require a reversal of the judgment.

It would serve no good purpose to further extend this opinion by a discussion of the many other errors assigned. We have endeavored to limit our discussion to the more important ones,—those relating to substance which can not be aided by verdict, and which affect the substantial rights of the defendants. In our study of the record and in preparing the opinion, we have endeavored to keep in mind a basic concept of American jurisprudence which, from time immemorial, has taught that every person charged with crime, regardless of his occupation or station in life, is entitled to a fair and impartial trial upon the issue or issues tendered by a legal indictment, returned by a Grand Jury empowered to act.

In view of what we have said, it necessarily follows that the judgment must be reversed. It is so ordered.

EVANS, *Dissenting.*

The assignments of error may be divided into two groups: (a) those that deal with the indictment; (b) and errors allegedly committed in the course of the trial.

Group (a) must likewise be divided into: (1) attacks on the grand jury and its authority to return the indictment here involved, and (2) assaults on the various counts of the indictment due to their alleged duplicity and inconsistency.

Convinced that the grand jury was within its authority in returning this indictment, I am compelled to dissent. This assignment raises a most important question. The holding of the majority opinion will greatly handicap the prosecution of offenders, who have concealed the facts establishing their crimes, so successfully, that a prolonged investigation into their activities is necessary. Moreover, I feel so certain that none of the counts of the indictment is demurrable because of inconsistency or duplicity, that dissent here, too, is necessary.

The assignments of error which challenge the sufficiency of the evidence to sustain the conviction of the first four counts set forth in the indictment have raised doubts which have made me pause, but here, too, I am persuaded that the evidence presented a jury question.

Other questions I shall discuss at such length as their importance, in my opinion, deserves.

(1) Defendants contend that the grand jury returned

the indictments upon *investigations* begun during *extensions* of its term, rather than during its initial term. This, it is asserted, was contrary to the statute, 28 U. S. C. A. Sec. 421, which reads:

> "* * * A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: * * *"

My reasons for rejecting defendants' urge in this regard are:—

(a) It is not shown that the indictment was a result of subsequent investigations, *i. e.,* investigations begun at the February or March Terms, rather than at the December Term.

(b) The indictment itself states that the investigations were in fact begun at the December Term.

(c) The crimes charged, all flowed from the same comprehensive and integral plan, so that in fact there could be but *one* investigation, although, because of statutory provisions, each year's attempt is made an "annual" crime as to each participant.

(d) The investigation as to the tax year 1939, which the proof pointed to, as necessarily showing a beginning of the investigation at the March, 1940 Term (because the crime was not committed until March 15, 1940) may well have been anticipated and investigation of its probable future commission begun at the grand jury's initial term in December, 1939. In fact, a study of this year may well have been deemed necessary to confirm the facts, *and the proper deductions from such facts,* developed in the investigation of previous years. It would have been negligent for them not to have continued their investigation of the criminal plan to the date of the hearing, when their investigation pointed strongly to the existence of a criminal plan in the years 1936, 1937 and 1938.

(e) In construing the statute, we must give a fair and rational construction to the word "investigation" otherwise a conclusion, unreasonable in its results will be reached.

To better understand the situation, I restate briefly the facts which this contention concerns:

December,	1939	The grand jury was impaneled
January	24, 1940	The first order extending the term of the grand jury
Feb.	28, 1940	The second order extending the term of the grand jury
March	1, 1940	The indictment No. 32127 against Johnson for same transactions as in counts 1, 2, and 3, of instant indictment, was returned (February Term.)
March	15, 1940	Commission of last substantive offense charged, *i. e.*, in regard to 1939 tax.
March	29, 1940	The instant indictment returned, during March Term.

The first order of extension, made January 24, 1940, authorized the grand jury to sit during the February, 1940 term of court to *finish* investigations begun but not finished at the December, 1939 Term. *We should presume they did what they were ordered to do.*

The second order of extension of the term of the grand jury (which order is the basis of defendants' attack) was on the petition of the grand jury therefor:

> "Now comes the * * December Grand Jury * * and * * requests that an order be entered authorizing them * * (the said Grand Jury) heretofore authorized to sit during the February 1940 Term * * to continue to sit during the * * March 1940 Term * * to finish investigations *begun but not finished* * * during the said December 1939 *and the said February 1940 Terms* * *.
>
> "It is Therefore Ordered That the * * December Grand Jury * * be * * authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing *said* investigations."

The defendants argue that since the indictment was returned during the third term and covered: (a) crimes* which had been the subject matter of an indictment returned during the second term, and as to which presumably investigations had been finished in said second term, a *new* investigation of such crimes. must therefore have

* Attempt to evade 1936, 1937, and 1938 taxes.

been begun in the third term; (b) crimes** not theretofore covered in the first indictment, and one of them in fact not committed until the third term — *a fortiori,* investigation as to these crimes could not have been begun in the first—December—Term and therefore any indictment charging such crimes is void because predicated on an investigation which the grand jury had no right to make, having been initiated during extensions of its original term.

This contention, though somewhat plausible, is quite fallacious.

(1) The indictment's preamble alleges

> "The Grand Jurors * * at the December Term * * having begun but not finished during said December Term of Court among other things an investigation of the matters charged in this indictment, *and having continued to sit by order of this court * * for the purpose of finishing investigations begun but not finished during said December Term of Court * *.*"

This was the same grand jury which presented the petition containing the words, allegedly ambiguous, upon which the order here assailed, is based. Should not their formal statement, made at the culmination of their deliberations be considered as proof positive of the facts they recite? Must not the formal statement of the grand jury as to their own acts, done in the secrecy of the grand jury room, be accepted? As against such positive statement, defendants without knowledge, make statements in the nature of conclusions, without explanatory basis or sources of information given—when it is apparent they make such statements merely on their own deductions from the fact that the fourth count of the indictment dealt with a fact which occurred after the December Term had expired.

The recital of this *fact* in the indictment can not be challenged by a demurrer, plea in abatement, or motion to quash, all of which challenge issues of law (Longsdorf, Cyclopedia of Federal Procedure, Secs. 2122, 2136, 2145.)

(2) The first order of extension, made January 24, 1940, authorized the grand jury to sit during the February, 1940, term of court to finish investigations *begun but not finished* at the December, 1939 term. Must we not presume the grand jury acted as it was legally directed to act, during the February term, *i. e., finish* investigations *begun*

** Attempt to evade 1939 taxes, and conspiracy count.

at December Term? If such be the fact, the *second* extension only gave them permission to continue investigations begun at the December Term, because they had had no authority to begin any other investigation during the February Term.

(3) The crimes, which the grand jury was investigating, were in reality the fruition of a *single scheme*, the results of which were multiple crimes arising not by virtue of the fact that distinct, separate, transactions and schemes were involved, but because the income tax statute makes possible a recurring crime for each annual period of its existence. As was said in the case of *U. S.* v. *Sullivan*, 98 F. 2d 79, CCA 2,

> "Indeed the crimes charged in the indictment describe one course of conduct extending over several years, which results in separate offenses simply because the duty to file a return and pay the tax is one that recurs every twelve months."

The scheme (assuming here its existence) was of a single, comprehensive plan wherein A, B, C, D, and E, claimed ownership of the respective gambling houses in order to relieve F, the real owner, of a liability for larger surtaxes. The scheme was a single one. It was to run for an indefinite period. In the course of its life various crimes were committed, some against state laws, some against Federal laws. The grand jury was put on the trail at its December Term. Due to the successful covering of all tracks, time and effort were required by the grand jury to ascertain whether the defendants' action was merely to avoid state law prosecutions or whether said defendants had committed violations of Federal criminal laws and were seeking to conceal their violations.

The grand jury was unable to complete its investigation in one month. It sought, and secured, an extension of time. Still it was unable to complete its investigation. It again sought and secured an extension of time. Undoubtedly, information was obtained during the first extension that had not been uncovered during the December Term. But it was the same criminal scheme, the investigation of which was begun in the December Term. The grand jury could validly continue to *investigate* the facts originally found at the December Term, supplemented by what it found during the first continuance, for it was the same illegal scheme which was being investigated.

Assume now, as defendants contend, that the grand jury

began its investigation of later aspects of this same illegal scheme during the February or March terms. In fairness to them, must we not accept their statement that they were merely *continuing* investigations begun at December Term? There is nothing to indicate these defendants formally terminated their relationships and started new ones each year, thereby making a new, an annual conspiracy. No, the defendants A, B, C, D, and E, having long ago conceived the plan of deceptive ownership of the various houses, merely maintained the same relationship through the years involved. The most that can be said is that the evidence which the grand jury may have considered at its later sessions manifested the continued life of the identical, integral, continuing scheme to defeat the income tax law by numerous deceptive acts. They may have come to the grand jury's attention later, but they were a part of the same investigation begun at the December Term.

The majority opinion places much weight on the fact allegations in the motion to quash—on the ground that such facts are admitted by the Government's motion to strike—which facts stated that as to the first three counts the investigation was necessarily completed on the return of the first indictment in February Term and such investigations being finished, they could not be again renewed (begun) during an extension of the same grand jury term because such extensions are made solely to cover investigations begun *but not finished* during the initial term. The motion to quash also states as a fact that as to the fourth count (1939 taxes) no investigation was begun until the March Term.

In passing it should be said that the allegation of such facts, wholly hearsay and unsupported by proof, and set forth in the nature of a conclusion, are properly challenged by a motion to strike.

As to the first three counts—of what materiality is the fact that the same crimes were covered by an indictment during the first extension of the term? Nothing could be better evidence of the fact that the investigation relative thereto was "not finished" during that extension than the fact that the grand jury found it necessary to present a second indictment to cover the *same* offenses. (The majority opinion concedes the right to continue investigations, even after the return of a first indictment. What is there then to prevent the indictment, on this issue, being valid as to the first three counts, and therefore valid support of the judgment?)

We ought not ignore the well-established rule that rulings on motions to quash and plea in abatement to indictments are not reviewable here, for "unless (there is) such a failure to properly exercise judicial discretion as to cause real injustice * * defendant can not complain where no prejudice has resulted. * *" **

The majority opinion states, "We are unable to discern how an illegal order of continuance can be cured or even aided by an allegation in the indictment to the effect that the Grand Jury was continued." Admitting that an illegal order of continuance is void, my position is that the instant order is neither illegal nor void when construed in the light of the facts shown by the indictment and the continuing nature of the crime under investigation. The indictment does not recite that the grand jury was "legally continued." It recites *facts* from which that deduction is inescapable.

The indictment states all the investigations were begun at the December Term. The first order directed them to continue only investigations begun at the first term. The second order permits them to "continue to sit for the purpose of finishing said investigations." The petition upon which the second order was based recited the grand jury had been theretofore authorized to sit during the February Term (note, it was only to finish investigations begun in December) and asked to be authorized "to continue to sit to *finish* investigations begun but not finished by * * (them) during the said December, 1939 and the said February, 1940 terms."

Why can not the time phrase "during the said December and the said February terms" be construed to modify merely the verb "finished" and not the *preceding* verb, "begun"—and the verb "begun" be read in the light of the first order of continuance, to mean "theretofore begun" in the December Term? I can reach no other conclusion than that a fair reading of the two petitions for extension of time and the language of the indictment wherein the grand jurors stated that they continued "to sit for the purpose of finishing investigations *begun but not finished* during said December Term of Court," closes the door to further discussion.

Another reason for this conclusion is to be found in the word "investigation" as used in this statute. "Investigation" is a noun which defines action. Alone, it is

** Longsdorf, Cyclopedia of Federal Procedure, Sec. 2132, 2135.

indefinite and well-nigh meaningless. The grand jury began its investigation when sworn in. (Charge of Justice Field, Federal Cases No. 18,250. Note to A. L. R. Vol. 22, p. 1356. *Blair* v. *U. S.*, 250 U. S. 273.) Investigation of what? Of crimes which were committed in the District? If this be its meaning then the field of investigation after the continuance, was limitless. This all-inclusive meaning must be rejected, I think, if for no other reason than that it renders meaningless the sentence wherein the word appears. The word "investigation" must have a more restricted connotation. A more limited and rational meaning of this word may be had if we bear in mind what the grand jury is organized for, and to emphasize the fact that it is to investigate facts. Being laymen (usually), they are hardly qualified to investigate legal questions such as are raised by counsel for accused after the indictment is returned. The grand jury investigates the facts brought to its attention, which facts establish or point to the commission of a crime.

To illustrate,—Before the grand jury, appears a witness, and tells of D's making and selling large quantities of liquor. Other witnesses confirm the story. The search is continued. The trail becomes hot. Defendant is not the only one involved. It appears the territory covered by the operations is extensive and the business, large. The participants are numerous. Also, it appears that a master mind behind the scenes directs the operation of all. He divides the spoils, retaining a goodly portion for himself.

The grand jury is unable to complete its study within the month and asks for, and secures, an extension of time in which to "investigate". To what must its investigation be confined during the continuance?

Let us go further with our imaginary case. During the second month's investigation the proof becomes more definite and clear as to individuals, as to crimes committed, and also of a conspiracy to commit them, as well as the names of the parties thereto. In justice, however, to the individuals, possibly innocent, whose names have been on the tongues of several witnesses, more time is needed and a second order of continuance is sought and obtained.

Finally, the indictments are about to be drawn. Unexpectedly, a witness appears who gives testimony which, in view of the previous stories, is entitled to great weight.

He admits his own participation in the enterprise. He is an actor who played a leading role in the tragedy. He is an accomplice, and his motive is to obtain immunity. However, he adds a new phase to the case. He tells the story of the inside working of the crimes. The long-continued success of the enterprise is due to the fact that the master mind has repeatedly bribed a revenue agent and thereby avoided prosecution.

Was the new crime, to-wit, bribery of the Government officer a part of the original investigation? Who is to determine when the grand jury investigation began, which disclosed not only the commission of substantive crime, but of conspiracy? If there were separate investigations, when did one end? The other begin?

Under the holding of the majority opinion the grand jury could not indict except for the substantive *crimes* which had been proven in the first month's investigation. Moreover, the court (and perhaps a petit jury) was required to first try and determine when the investigation of count one began—and also of counts 2, 3, 4, and 5. The statement of the grand jury in its indictment is of no avail.

The more logical construction of the word "investigation", as here used, it seems to me, can be had by limiting it to those matters which engaged the attention of the grand jury term during the December Term, but not restricting it to crimes which had been *established* during that first month's inquiry. If the facts established by the testimony brought out on the second or third continuance of the grand jury term disclose a crime or crimes, *and such facts are associated with the subject-matter of the investigation of the first term,* the grand jury may validly indict therefor.

The rights of defendants charged with crime should always be diligently protected. Courts and grand juries, statutory creatures that they are, should never exceed their statutory powers. But, just as important, is the binding force of a conviction of one accused of crime, whose long and carefully contested trial has resulted in a verdict of guilt. We must not be deceived by astute presentation of a hypercritical contention which delves into the niceties of every possible technical defect, be it, as here, the ambiguity of the second order continuing the grand jury term, or the question of duplicity, discussed immediately following. Pleadings and orders in criminal cases should be read and construed rationally and reasonably and fairly.

Grand juries and indictments are to prevent false and malicious charges and to inform defendants of the charges upon which they must stand trial.

2. *Duplicity.* Was there duplicity? Was there a charge that the co-defendants were accessories after the fact?

The specific wording of the counts challenged negatives any intent to charge a crime other than aiding and abetting the crime of attempting to evade the income tax for each year. The language is clear and only hypercritical deductions can support a contention that the crime of accessory after the fact was also meant to be charged. As was said by this court in *Meyer* v. *U. S.*, 258 F. 212, 214,

> "Another contention is that the indictment does not show that the overt act was done to effect the object of the conspiracy. Invoking the rule that inferences are to be taken against the pleader, plaintiffs in error insist that we shall infer that they lawfully turned over the * * check * *. *But the rule does not extend to imagining inferences that are contrary to the fair common sense reading of the averments.*"

Obviously, the attempt to evade a tax is a continuing crime, running to the date of the Government's discovery and indictment therefor. It may, of course, encompass several distinct offenses in the course of its duration. The attempt is effectuated in part by the filing of the return on March 15, partly by concealing of records, failure to keep books, continued holding by others of income-yielding businesses of taxpayer, etc. The crime of attempt is not necessarily ended with the filing of the return, if the attempt in fact continues thereafter. Neither is the crime of aiding the attempt, there ended. The attempt to evade may be, and often is, finally terminated on its discovery by the Government. This reasoning does not, however, preclude the indictment of the taxpayer for some isolated act effecting the attempt, such as the filing of a false return on a particular day.

Counsel stress the fact that co-defendants are charged with aiding not only before March 15, of each year, but continuously thereafter, to the date of the indictment. Aside from the suggestion just made, that the crime of aiding the attempt actually continued for such period, it may be pointed out that Johnson, the principal, was charged not only with filing a false return on the particular date specified, March 15, but—*without specifying the time*—

charged that he concealed from the Government officers his income and all books and records reflecting such income.

A plain reading of the counts discloses the charge of but *one* offense, *i. e.*, aiding and abetting the offense.

But, conceding there was a multiplicity of offenses charged, was it a prejudicial or reversible error? Not if the inescapable trend of precedents upholding indictments against attack on the ground of duplicity where no prejudice is shown, be followed.*

Language of Indictment Indicative of Charge of Single Crime, in each Count. A study of the indictment plainly reveals Johnson (in count one) is charged simply with an attempt to defeat and evade income taxes in that he "did wilfully and knowingly attempt to defeat and evade a large part * * of a tax upon his net income for the cal-

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* *Jelke* v. *U. S.*, 255 F. 264:

"Decisions that reject technical objections to criminal indictments are not now the exception, and an overwhelming array of authorities may be found that call for liberal construction of criminal pleadings (citing many cases).

"While perhaps instructive, we are convinced that many of the criticisms made are hypercritical and evidence scholastic ingenuity, but if adopted in this case, or applied to the average indictment, 'would rightly bring odium upon the administration of justice in the minds of all sensible people, whether learned in the law or not.'"

In *Hewitt* v. *U. S.*, 110 F. 2d 1, 5, the Eighth Circuit said (quoting the Supreme Court in part):

"'The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'

"'This section was enacted to the end, that while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading. * *

"The sufficiency of an indictment should be judged by practical and not by technical considerations. It is nothing but the formal charge upon which an accused is brought to trial. An indictment which fairly informs the accused of the charge which he is required to meet and which is sufficiently specific to avoid the danger of his again being prosecuted for the same offense should be held good."

The Fifth Circuit said, in *Hartwell* v. *U. S.*, 107 F. 2d 359, 362,

"While it is certainly true that a valid indictment can not be dispensed with as a predicate to conviction where an indictment is necessary * * it is also true that the practice of fine combing indictments for verbal and technical omissions is no longer countenanced in courts, and that a substantial compliance with the purpose of an indictment to acquaint the defendant with the offense of which he stands charged, so that he can prepare his defence and protect himself against double jeopardy, is sufficient."

endar year 1936 * * which said wilful attempt * * was by means and in the manner following (here follow numerous recited acts, in themselves offenses, which Johnson claims rendered the indictment duplicitous as to him) * *." As to co-defendants, it is specifically charged that "during the calendar year 1936 and up to and including March 15, 1937, and continuously thereafter up to and including the date of filing this indictment * * (naming co-defendants) did unlawfully, feloniously, wilfully and knowingly aid, abet, conceal, induce and procure the said defendant Johnson * * to attempt in the manner aforesaid to evade and defeat the income tax aforesaid * * by the means and in the manner aforesaid * * (26 U. S. C. A. Sec. 145).

The co-defendants are charged merely with aiding in such attempt. They are not charged with being accessories after the fact as they allege, but merely with continuously aiding the attempt. The words "feloniously aid in the attempt in the manner aforesaid" conclusively show the pleader had but one crime in mind, and that was not the misdemeanor of an accessory after the fact.

Moreover, duplicity does not arise from the fact that the allegations would support the charging of two crimes, *if in fact only one be charged or adequately stated.** I think that is the instant situation.

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* In *Howell* v. *U. S.*, 296 F. 911, the Fifth Circuit said:

"It thus appears that it is an offense for a dealer to fail to register and to pay the special tax, and that it is another and separate offense for any person to purchase or sell derivatives of opium or cocoa leaves, such as * *, except in form of packages to which the tax paid stamps are attached.

"Each of the offenses above named should be charged in separate counts of an indictment because they are separate. That part of the indictment which charges that the defendant as a dealer was required to register, and that he unlawfully dealt in the prohibited drugs, *does not charge that he failed to register. The indictment, therefore, does not charge one of the two offenses, and it follows that the language just referred to is surplusage.* But the indictment does charge that the defendant was a dealer, and dealt in and had in his possession narcotics to which the stamps evidencing the payment of the internal revenue tax were not attached. It therefore sufficiently charges the second of the offenses above mentioned. The form of the indictment is imperfect, but in our opinion it is sufficient to uphold the conviction of the defendant as a dealer, for the reason that the attempt to charge the failure to register was not successful."

In *Ray* v. *Commonwealth of Ky.*, 230 Ky. 656, 66 A. L. R. 1297, the Kentucky Court of Appeals said,

"The effort to charge appellant as an aider and abettor, after charging him and G. as principals, and without setting out the charge of aiding and abetting in a separate count, does not render the indictment as a whole defective (the indictment was in one paragraph). * * In *Watkins* v. *Com.*, 227 Ky. 100 * * an indictment for murder

Where Several Crimes Recited Are Incidents of One Transaction There Is No Duplicity. Duplicity does not arise where the offenses charged are merely varying aspects or incidents of the same transaction.* The princi-

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charging two defendants as principal and as aiders and abettors in a single count, was held sufficient."

27 American Jurisprudence, Indictments and Informations, Sec. 126, page 686:

"Although at common law different grades of the same offense cannot be included in the same count, it is now the generally approved practice to allow the different grades of the same offense to be thus joined, as also an offense or offenses included in the principal crime charged, although it is the more usual practice to set up the several grades or degrees in different counts. An indictment against two persons which charges both as principals and later in the same count charges the accused alone with aiding and abetting in the commission of the offense, is not defective for not stating the latter charge in a separate count."

In *Kitrell* v. *U. S.*, 76 F. 2d 333 (CCA 10) the court said:

"It is said that each (count) is bad for duplicity in that each charges an attempt to defeat and evade the tax and a failure to make a return, and that the only method of tax evasion charged is the failure to make return. But the third count does not charge * * * * Nor can it be maintained that either of the counts is duplicitous. The questions thus raised seem to now be authoritatively settled against appellant's contention."

The Court, in *Connors* v. *U. S.*, 158 U. S. 408, 410, said:

"The first assignment of error questions the sufficiency of the indictment in that it charges the accused, as he insists, with three different offences in one count, namely unlawfully and with force and arms seizing, carrying away, and secreting the ballot box; * * that having *aided and assisted* in the forcible and unlawful seizure * * and with having *counselled, advised and procured the seizure.*

"This objection to the indictment is not well taken. The offense charged was that of unlawful interfering with the officers of the election in the discharge of their duties * *. The verdict of guilt had reference to that crime, whether committed in one or the other of the modes specified in the indictment. Undoubtedly it was in the discretion of the court to compel the prosecutor to state whether he would proceed against the accused for having himself seized, carried away, and secreted the ballot box, or for having assisted or procured others to do so. But there was no motion * * to make such statement * * nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offense with which he was charged. * *"

* *Crain* v. *U. S.*, 162 U. S. 625, 636. The Supreme Court said:

"We are of the opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that Congress intended to reach was the obtaining of money from the U. S. by means of fraudulent deeds, powers of attorneys, orders, certificates, etc. * * The statute was directed against certain defined modes for accomplishing a general object, and declared that the doing of

pal offense here charged was the attempt to evade income taxes. The co-defendants' offense was aiding that attempt. They gave such aid before the filing of the return by filing separate returns which misled the Government as to the true ownership of the houses, and, after the return, by concealing, failing to keep, or destroying, records, and by continuing the deceptive ownership of the various houses. All the acts were simply means of effecting their crime *of aiding* the attempt—that was all that was charged by the indictment or punished by the sentence. I have very serious doubt that an aider of the crime, who is punished as a principal, could also be punished as an accessory after the fact, even if it were so charged. When he becomes a principal, the other offense becomes merged. Otherwise, an aider before the fact and after the fact could be more seriously punished than the principal, which was hardly within the contemplation or purpose of the Act.

Allegation of Dates May Be Treated as Surplusage. The indictment which gives rise to the alleged duplicity concerns the dates, or period, covered in connection with the said complicity of the co-defendants. Such dates or allegation of period may be treated as surplusage. The date is not a material element of the offense charged—and the period beyond the March 15, if that be taken as the crucial

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either one of several specific things each having reference to that object, should be punished by imprisonment. * * We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it."

In *Skelly* v. *U. S.*, 76 F. 2d 483, the CCA Tenth held

"The acts of a principal to a substantive offense and the acts of an accessory after the fact thereto, are one continuous criminal transaction. At common law the principal and accessory after the fact may be jointly indicted and where so indicted they should be charged in one count * *. Therefore the acts of the two constitute a single offense committed by them jointly, one acting as principal and the other as accessory after the fact."

U. S. v. *Leche*, 34 F. Supp. 982, aff'd. 118 F. 2d 246; *Silkworth* v. *U. S.*, 10 F. 2d 711; *U. S.* v. *Fero*, 18 F. 901; *Rowan* v. *U. S.*, 281 F. 137; *Egan* v. *U. S.*, 287 F. 958; *Greenbaum* v. *U. S.*, 80 F. 2d 113; *Kurczak* v. *U. S.*, 14 F. 2d 109; *U. S.* v. *Otto*, 54 F. 2d 277; *Jacobsen* v. *U. S.*, 272 F. 399; *Connors* v. *U. S.*, 158 U. S. 408.

date, may be considered as surplus allegation* or be corrected by the facts proved.**

Duplicity may be error of form, which under 18 U. S. C. A. Sec. 556, does not render the indictment bad.***

Looking at this matter of the allegation of the continued aid of the principal's attempt to evade each year's tax, from an ordinary, common sense viewpoint, we have simply a case of A, B, C, D aiding E to evade 1936 tax by X means, and aiding the attempt to evade the 1937, 1938, and 1939 taxes by the same X means—they have really but used the X means continuously to assist the effectuation of the annually recurring attempt, and, since the assistance covered at least four years, and appertained to all years' taxes, this assistance is, unfortunately for the co-defendants, made four offenses by virtue of the statutory annual recurrence of criminal liability. Since such assistance existed in each year as to that respective year's taxes, and perhaps inferentially, though not inevitably, as to the preceding year's or years' taxes by virtue of the Government's failure earlier to discover the scheme, no prejudice and no untruth in allegation occurred. *Where there is no prejudice, no reversible error results from duplicity.*†

No Prejudice Where A Sentence Is Supported by One Valid Count. It is most important to recognize the fact that the judgment of sentence and fine on each of the substantive counts was to run concurrently with that imposed on the first count. Under the well-settled rule, if one count supports the judgment, it will not be overruled even though other counts do not sustain the judgment.††

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* *Capone* v. *U. S.*, 56 F. 2d 927; *Sondericker* v. *U. S.*, 41 F. 2d 144, see also, *Meyer* v. *U. S.*, 258 F. 212; *Johnson* v. *Biddle*, 12 F. 2d 366; *Farley* v. *U. S.*, 269 F. 721; *Sugar* v. *U. S.*, 252 F. 75; *U. S.* v. *Socony Oil Co.*, 310 U. S. 150.

** *U. S.* v. *Meyering*, 54 F. 2d 621.

*** *Clayton* v. *U. S.*, 284 F. 537; *Morgan* v. *U. S.*, 148 F. 189; *U. S.* v. *Rogers*, 226 F. 512.

† *Morgan* v. *U. S.*, 148 F. 189; *Bailey* v. *U. S.*, 278 F. 489; *Lewellen* v. *U. S.*, 223 F. 18; *Nudelman* v. *U. S.*, 264 F. 942; *Wetzel* v. *U. S.*, 233 F. 984; *Sparks* v. *U. S.*, 90 F. 2d 61; *Clayton* v. *U. S.*, 284 F. 537.

†† *New* v. *U. S.*, 10 F. 2d 146; *Hawkins* v. *U. S.*, 1 F. 2d 596; *Reuben* v. *U. S.*, 86 F. 2d 464; *Aczel* v. *U. S.*, 232 F. 653; *Greenburg* v. *U. S.*, 253 F. 728; *Taylor* v. *U. S.*, 2 F. 2d 444; *Clifton* v. *U. S.*, 45 U. S. 242; *Claassen* v. *U. S.*, 142 U. S. 140; *Powers* v. *U. S.*, 223 U. S. 303; *U. S.* v. *Trenton Potteries*, 273 U. S. 392.

Does not the first count sustain the judgment? What is the sentence and fine? Are they not merely the maximum penalty for one found guilty as an aider and abettor, *i. e.*, as principal (and not accessory) in attempt to evade?

Reading this evidence with a most indulgent eye and giving the verdict the credence and weight which is its due in a criminal case, I can not, in all generosity to these defendants, charged with attempting to evade, or assisting in such evasion, find it possible to say there was no evidence for *any* of the years, 1936 to 1939, to sustain the verdict and judgment.

Statutory Reference in Count to the "Attempt" Statute, Not the "Accessory After the Fact" Statute. The counts of the indictment here challenged refer to but *one* statute as the foundation of the indictment, namely, the statute making it an offense to attempt to evade income taxes (26 U. S. C. A. Sec. 145). It does not cite the "accessory after the fact" statute, 18 U. S. C. A. Sec. 551. The indictment uses substantially the phraseology of said statute and specifies the crime to be, *inter alia*, a "felonious" aiding and abetting, which it could not be if the charge were one of accessory after the fact, which is a misdemeanor.

Bill of Particulars Indicated Single Offense of Aiding Was Charged. The bill of particulars (Part VI, A) is illuminative of the pleading in the indictment relative to the "continuous" nature of the aiding and abetting, namely, that the *identical* scheme for aiding continued throughout the years, *i. e.*, the fictitious ownership of the various houses, the filing of false returns, each relative to the particular year's taxes attempted to be evaded. Even as to acts which might most readily be construed to be acts of an accessory after the fact, such as in Part VI A 10 of the bill of particulars—"On December 29, 1939, * * (co-defendants) made a false statement to certain Internal Revenue officers." But this accusation is followed not by a charge of being accessory after the fact, but by the allegation "and thereby did then and there knowingly *aid and assist* said Johnson in *wilfully attempting to evade* and defeat * * the payment of his individual income taxes * *."

Instruction Was Only for Offense of Aiding. The charge to the jury covered *solely* the "aiding and abetting offense" and a reading of the statute providing therefor

and making an aider a principal.* The court in instructing the jury said

> "Generally speaking, counts 1, 2, 3 and 4 charge the defendant William R. Johnson with willful attempt to defeat and evade income taxes alleged to be due * * and charge the other defendants with aiding, abetting, inducing and procuring the defendant Johnson in his attempt to defeat and evade. (Then quotes the statutory provision on aiding and abetting.)
>
> "Accordingly, it is the law that one who aids, abets, counsels, commands, induces or procures the commission of a crime is a principal, and you may consider Counts 1, 2, 3 and 4 of the indictment as charging that all of the defendants wilfully attempted to evade and defeat the income taxes alleged to be due from * * Johnson * *."

Sentence Was Only for Offense of Aiding. The sentences of the co-defendants were solely for the "aiding and abetting" offense (and conspiracy). There was therefore no prejudice to the defendants, and it is indicative, as was the instruction, that but one offense was alleged, tried, and found.**

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* In *Lewellen* v. *U. S.*, 223 F. 18, (CCA 8) the court said:

"It is probable that the U. S. attorney was either uncertain about the law or the facts of the case, and attempted to make averments in one count charging both offenses. This is not permissible; but as there was no special demurrer for duplicity or other attack upon the indictment, and as the trial judge instructed the jury concerning the law governing the second mentioned offense only, namely, the carrying of liquor from without the state into the Indian Territory, and as under that charge the defendant was found guilty 'as charged in the indictment' and sentenced accordingly, this court will treat the indictment in the same way as charging a violation of the offense denounced by the Act of 1895 only."

In *Wiborg* v. *U. S.*, 163 U. S. 632, the Court said:

"Defendants' counsel did not seek to compel an election, nor in any manner by their motion to arrest or otherwise, to raise the question of duplicity, nor do they now make objection to the proceedings on this ground. The district judge instructed the jury that the evidence would not justify a conviction 'of anything more than providing the means for aiding such military expedition by furnishing transportation for their men * *.' Under these circumstances, the verdict can not be disturbed on the ground that more than one offense was included in the same count of the indictment, but it must be confined to the offense to which the jury were confined by the court."

** Refusal of trial courts to direct an election of offenses charged has been held to be non-prejudicial where but one sentence was imposed. *Nudelman* v. *U. S.*, 264 F. 942; *Wetzel* v. *U. S.*, 233 F. 984.

Indictment in Language of Statute Sufficient. The offense of aiding and abetting was charged in substantially the language of the statute, and is sufficient. It was not subject to demurrer, motion to quash or demand to elect. The indictment charges the co-defendants did "unlawfully, feloniously, wilfully, and knowingly, *aid, abet,* conceal, *induce* and *procure* the said defendant Johnson * * to attempt in the manner aforesaid to evade and defeat the income tax." The "aider" statute provides, whoever "*aids, abets,* counsels, commands, *induces,* or *procures* its commission, is a principal." These two phraseologies are sufficiently parallel to render the former an allegation simply of an aider of the attempt and an allegation of the offense in the statutory terms, and therefore valid.*

3. *Witness Clifford's Answer to Hypothetical Question.* The majority opinion stresses the error arising from the Government's accountant witness Clifford's testimony, who it is contended by defendants usurped the jury's function,** when answering a hypothetical question—to the effect that Johnson had a taxable income in excess of that which he reported.

It is conceded that hypothetical questions have their proper place, but they must be predicated on stated "assumptions" as to evidence presented, and the witness is not to be permitted to decide the ultimate facts and thereby usurp the jury's function.

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* *Tinkoff* v. *U. S.*, 86 F. 2d 868; *Capone* v. *U. S.*, 56 F. 2d 927; *Yip Wah* v. *U. S.*, 8 F. 2d 478; *Rowan* v. *U. S.*, 281 F. 137; *Jelke* v. *U. S.*, 255 F. 264; *Peck* v. *U. S.*, 65 F. 2d 59; *Chiaravalloti* v. *U. S.*, 60 F. 2d 192; *Guzik* v. *U. S.*, 54 F. 2d 618; *Wygant* v. *U. S.*, 6 F. 2d 148; *Pounds* v. *U. S.*, 171 U. S. 35; *Ledbetter* v. *U. S.*, 170 U. S. 606.

** On the "usurping of the province of the jury" Wigmore states, Sec. 673:

> "This being the plain, logical, and necessary reason for the use of the hypothetical question, it will easily be seen that it is not resorted to from any fear that the witness will 'usurp the function of the jury.' This bugbear, vigorously denounced with sentimental appeals to the value of jury trial, has been made to serve again and again as the dreadful source of those evils which the hypothetical question enables us to avoid. But the expert is not trying to usurp that function, and could not if he would. He is not trying to usurp it, because his error, if any, is merely the common one of witnesses, that of presenting as knowledge what is really not knowledge. *And he could not usurp it if he would, because the jury may still reject his testimony and accept his opponent's,* and no legal power, not even the judge's order, can compel them to accept the witness' statement against their will. * * The 'usurpation' theory * * has done much to befog bench and bar, and to assist in producing some of the confusion which attends the precedents."

But merely studying the quotations of the record given in the majority opinion it is obvious that the answers were to questions framed on assumptions. He is asked the amount of Johnson's income, say for 1936, *according to his computations,* with "exhibits and evidence in the record" "used as a basis for his computation." The "exhibits and evidence" were Johnson's tax returns, certified copies of local assessment lists, escrow agreement, Bon Air records, accountant Horwath's records, etc."

An accountant may be permitted to total income from all the sources mentioned in the exhibits he has identified, and state such total solely as *"his computation."* The defendants can in defense show their evidence, and the jury's function is to make their own computation, guided, if they wish to be, by the accountants for the respective sides.

Whether or not Johnson had income in excess of that which he reported was one of the facts which the jury had to determine from all the evidence. The jury could and probably did reject some evidence as not credible or relevant. If it did not believe the Bon Air records were pertinent to Johnson's income tax liability, they could be discarded, and the jury could also throw out Clifford's conclusions along with it.

We are here dealing with a long trial wherein the defendants exercised their right to a jury trial. We cannot assume that the jury failed to properly weigh the evidence or that it lacked the intelligence to understand what the charge involved and the nature and quantum of proof necessary to sustain the charge. *It would indeed be hard to believe that any juror failed to understand that the witness' answer was not based on said witness' assumption of taxable income.*

Both counsel cite the *Guzik* case, (54 F. 2d 618). The case favors the Government's contention though not a square holding that the identical question here under review was proper. It was there said:

> "Objection was made to the submission of a hypothetical question asking a witness to calculate the amount of tax which would be due on the assumption that the government's evidence (bank deposits and dividends, etc.) reflected taxable income. Since the computation is merely an arithmetical process, thereby

avoiding any difference of opinion as to the result, the objection must be considered as directed to the assumption that the items set forth were income. Objection was also made that such question did not include certain other facts tending to show losses. In discussing the limitations on hypothetical questions, Jones, in his Commentaries on Evidence, states: '* * * Where the facts are in dispute it is sufficient if a hypothetical question fairly states such facts as present the examiner's theory of the case. It cannot be expected that the interrogatory will include all the contentions or theory of the adversary, since this would require a party to assume the truth of that which he generally denies. * * * Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly. A question should not be rejected because it does not include all the facts of which there is any evidence at all. * * Generally speaking the trial court is the arbiter of the propriety of the question; and the real test of the propriety of any given hypothetical question is its fairness. * * We conclude that the government's assumption that the receipts constituted evidence of income was the valid basis for the hypothetical question submitted. The jury still had to determine the controverted issue of whether the assumption were correct.''

If one were to frame a technically correct hypothetical question in this kind of case, the preamble would be so long the jury would be unable to retain the facts on which the question was predicated. Hundreds of items would need to be considered in determining Johnson's annual income. A hypothetical question including them in its premise would be of doubtful value.

Moreover, guilt does not depend on a finding that every item which the Government claims should be included, be accepted by the jury. It was not every item which was decisive of the outcome.

Another factor in the framing of hypothetical questions arises where the witness has just testified to the facts on

which the question is based. That was the case here. In such instances, it is hardly necessary (unless the situation necessitates the recital so that the jury will understand the answer) that all the testimony which he has just given should be restated at length in the question.*

4. It is contended that the proof does not sustain the conspiracy charge—*i. e.*, appellants were not shown to have conspired specifically to aid Johnson in his attempt to defeat his income tax. It may be admitted that they acted jointly, even conspired, but, so it is argued, the object of their joint action was not to defraud the U. S. Government out of its income taxes, but to avoid prosecution of the Illinois statutes dealing with gambling.

It is of course conceded that a conspiracy may be established by circumstantial evidence, but Appellants argue, it must be established—and the conspiracy must be the one charged in the indictment. To meet this requirement the Government's proof disclosed the probable reason for the existence of such a conspiracy—deceptive ownership of gambling houses and filing of returns by co-defendants as owners—lay in the attempt to avoid income taxes, not in trying to avoid local prosecution for gambling. They state that no other motive could have prompted the defendants to deny to the Government investigators ownership of the houses.

The jury found that the income of the respective houses belonged to Johnson by virtue of his ownership of them—*a fortiori*, neither the income nor the houses belonged to the co-defendants, and they therefore were intentionally combining to mislead the Government in income tax matters

* Wigmore, Sec. 675. "But does it follow that, when the opinion comes from *the same witness* who has received the basis of it by actual observation, those premises must be stated beforehand, hypothetically or otherwise, by him or to him? For example, the physician is asked, 'Did you examine the body?'; 'Yes'; 'State your opinion of the cause of death.' Is it here necessary that he should first state in detail the facts of his personal observation, as premises, before he can give his opinion?

"In academic nicety, yes; practically, no; and for the simple reason that either on direct examination or on cross-examination each and every detail of the appearance he observed will be brought out and thus associated with his general conclusion as the grounds for it, and the tribunal will understand that the rejections of these data will destroy the validity of his opinion.

"Through failure to perceive this limitation, Courts have sometimes sanctioned the requirement of an advance hypothetical statement even where the expert witness speaks from personal observation. * * But this fallacy of being too unpractical in forcing the logic of the theory is generally and properly repudiated."

by filing tax returns as owners of the houses when in fact they knew the houses and their income belonged to Johnson, and should have been reported by him. It would be strange that this same group should go on year after year filing these deceptive returns if it were not done pursuant to an agreement of each co-defendant with Johnson.

The rather nebulous strands with which the Government's evidence wove the several defendants together convinced the jury that each defendant knew his place in the scheme and knew of the others' participation. We cannot review such evidence. The credibility of the witnesses, some in denying all intent of conspiracy to attempt to evade income tax, and others, in giving evidence of a common enterprise, to deliberately mislead the Government in its ascertainment of income received—is not for us to review. The jury alone must weigh the words of those who appear before them and neither this nor the district court can set aside its findings.

It should also be mentioned that the sentence imposed upon the conspiracy count (which punishment is lesser than on the substantive counts) was by the judgment made to run consecutively with the other sentences, so that reversal can not be won for insufficiency of the evidence to support the conspiracy count, if any substantive count supports the judgment.

Defendants argue that the proof does not sustain the conspiracy charge, *i. e.*, that defendants other than Johnson were not shown to have conspired, specifically, to aid Johnson in his attempt to defeat *his income taxes.*

It may be admitted, so it is argued, that all the defendants acted jointly, even conspired together, but the object of their joint action was not to defraud the United States Government out of its income taxes, but to avoid prosecution for gambling under the Illinois statutes.

It is, of course, conceded, that a conspiracy may be established by circumstantial evidence. But, defendants argue, it must be established,—and the conspiracy must be the one charged in the indictment. To meet this requirement, the Government's proof disclosed deceptive ownership of gambling houses and the filing of income tax returns by co-defendants, as owners, when, in fact, neither the property nor the income was theirs. This alone not only *tended* to establish, but rather conclusively *proved* the joint effort

was to avoid income taxes, not to avoid local prosecution for gambling. Rather persuasive is the argument that no other motive could have prompted the defendants to falsely deny to Government investigators the ownership of the houses. For it is hardly conceivable that individuals would falsely subject themselves to income tax liability if the conspiracy was not to evade the income tax of the large taxpayer. The jury was justified in assuming that the crux of this case turned on the answer to the question, To whom did the gambling houses belong and who was entitled to the income from their operations?

If these houses belonged to Johnson and he was entitled to the income and he excluded such income from his income tax returns and other defendants included such income as part of their returns when it was not in fact their income, then the crimes charged in the indictment were established. Of this there can be no doubt.

The proof of the ownership of the property, as well as the income, was not even circumstantial in character. It was direct and positive. Defendants' only hope of escaping from its telling effect was to show the testimony of the Government witnesses to be false. This they endeavored to do. Apparently the jury disbelieved them and accepted the testimony of the Government witnesses. Reduced to its last analysis, this issue determined the merits of the case. We have been favored with instructive briefs. I am convinced that a clearer case for the jury could hardly be presented.

There are many other assignments of error. The trial was long, and the questioned rulings are numerous. The trial court's refusal to instruct the jury as requested; its rulings on admission and rejection of evidence; its participation in the examination of witnesses—all come in for criticism and challenge.

In short, it is earnestly argued that the defendants were not given a fair trial.

The case was one which necessitated great care to prevent, if possible, the prejudice which jurors might naturally entertain against individuals who had admitted they had long been, and were professional gamblers operating on a big scale, from affecting their deliberations of the charges stated in the indictment and which did not involve crimes arising out of their gambling operations.

Defendants were entitled to a fair trial on the charges preferred against them. Their guilt of offenses not charged in the indictment had no bearing (save as it may have affected credibility) on the charges set up in the indictment. In order that our judicial system and practice in criminal cases be vindicated, utmost care is required so that no ruling or comment by the court take place which would have the effect of communicating to the jury an impression that the court was unfavorable to defendants.

Without going into all the details, because, in view of the fact that the case is to be reversed and dismissed, according to the majority opinion, I call attention merely to the instruction of the trial judge on this phase of the case.

The court said:

> "You must not permit the kind of business in which the defendants were engaged to prejudice you against them or any of them. The fact, if it be a fact, that some defendant or defendants committed some offense against the laws of the United States or the State of Illinois other than those charged in the indictment creates no presumption that such defendant or defendants committed the offense here charged against him or them."

The language speaks for itself. It was clear; it was explicit and it was positive. Defendants could not ask for more. Their requests may have been more wordy and more argumentative, but they did not better state the law than the foregoing instruction.

At this late date, it is hardly necessary to state that the trial court was not required to give instructions in the language of defendants' counsel, provided the thought therein contained was clearly and fairly stated.

There are two different theories or conceptions of trials in criminal cases. The one which appeals to me, views the trial as a means of ascertaining a fact,—the fact being the guilt or innocence of the accused.

Rules governing such trials favor the accused. This policy of favoring the accused is the result of centuries of experience. It has, for its background the concept of making certain that the innocent shall not be convicted,—that it is better that many who are guilty may be acquitted rather than one innocent party be convicted. The rules

which ordinarily accomplish this result are too well known to require restatement.—Except for them, a fair trial in a criminal case is quite similar to that in a civil case. In both cases, it is a search, through competent and relevant evidence of the best nature, for the truth.

On one side is society seeking to protect itself and restrain the violator from stepping outside the law to enrich himself or to accomplish a selfish end at the expense of others. On the other side is the accused, in whose favor presumptions are created to protect him in the enjoyment of his liberty and in his reputation as one of a society of law-abiding citizens.

Although the personal element will always be more pronounced in a criminal case than in a civil suit, the controversy should, in the last analysis, be simply an honest inquiry into the accused's guilt or innocence.

The other theory of a trial in a criminal case is one entertained by members of the bar engaged chiefly in trial of criminal cases. To them it is a fencing contest between counsel, where the real issue of fact, to-wit, the guilt or innocence of defendant is lost in the heat of the duel between opposing counsel. The sole effort is to inject error into the trial. The longer the trial the better the chance of error. Hence a jury trial is demanded for the opportunities of injecting error are thereby multiplied. And every erroneous ruling is presumptively, prejudicial.

This theory finds some support in early judicial precedents. Such holdings rise to dominant importance, if only they be in point.—And that is so regardless of their vintage or the absence of sound reason to support them. In this view all later cases ignoring or inferentially overruling such earlier precedents, are brushed aside as out of harmony with the rule which gives the accused the benefit of all doubts. This view necessitates the rejection of reason and all growth, change, or development of the law in the field of criminal trials.

Admittedly this view makes for excitement and uncertainty in criminal cases, emphasizes the emotional side of all participating therein, and gives to the public—particularly the curious public, an opportunity for a thrill. In my opinion it is not promotive of justice, places a premium on long trials, adds to the expense of the trial, encourages questionable practices and often brings the administration of justice into disrepute with the law-abiding citizen.

A jury trial is demanded, *not* because of greater faith in the jury's ability to ascertain the truth, but because jurors are often more easily confused by a long trial and avoidance of all errors by the court is more difficult in a long jury trial.

Stipulations of facts are never made, not because the facts are uncertain or unknown, but because some technical error may occur in the introduction of their proof, or the prosecution may have difficulty in securing the attendance of all its witnesses at one time. A pretrial conference is never held because the court is powerless to call one. There is no effort, as in a civil case to confine the trial to the controverted issues. In short, the protection of society against the raids of its transgressors is overlooked or forgotten, and the decision goes according to the technical rules of the fencing contest.

It seems to me that the holding of the majority of the court is a vindication of the second theory above referred to. No prejudice to defendants is shown. A freely drawn grand jury has presented a charge and a trial with conviction has occurred. Not merely reversal, but reversal with dismissal following, is ordered because the charge is made by a grand jury which obtained an order for its continuance so as to complete its investigation. Because perchance, its investigation may have exceeded the crimes uncovered at its first term's study, its authority to act in any and all respects is lost. In its actual results, the conviction is reversed and the prosecution must be dismissed.

On the entire record I am convinced that there was no prejudicial error committed, and that the judgments should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 813

WILLIAM R. SKIDMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 486–496) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 31, 1941 (R. 497), and a petition for rehearing denied on December 4, 1941 (R. 498). The petition for a writ of certiorari was filed December 24, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

QUESTIONS PRESENTED

While the petitioner lists some twenty points to be urged as errors, it appears that the principal questions involved are the following:

1. Whether the indictments were returned by grand juries lawfully continued during a second term of court.

2. Whether the court below correctly held that there was no evidence that the grand jury or the petit jury was illegally or unfairly drawn.

3. Whether there was any error in the returning of a separate verdict on each indictment.

4. Whether the court below correctly held that there was no improper cross-examination of the petitioner.

5. Whether there was any error in the final arguments to the jury.

STATUTES INVOLVED

The relevant provisions of the statutes involved are set forth in Appendix A, *infra*, pp. 20–22.

STATEMENT

On September 1, 1939, a grand jury impaneled in the June term of court in the Northern District of Illinois returned an indictment, No. 31770,

against the petitioner containing five counts, charging wilful attempts to defeat and evade his individual income taxes for the years 1933 through 1937, respectively [1] (R. 5–21). On February 29, 1940, a second indictment, No. 32125, was returned against the petitioner in the same court by a grand jury impaneled in December 1939, charging the commission of a similar offense for the year 1938 [2] (R. 27–30). These indictments were consolidated for trial, and after trial before a jury the petitioner was convicted on the latter and the fourth and fifth counts of the former (R. 426–430).

On May 9, 1940, the petitioner filed a plea to each indictment praying that it be quashed for the reason, among others, that the investigation against him had not commenced at the initial term of the grand jury (R. 32–33, 41–42). These pleas were set for hearing, and after hearing, upon motion of the United States Attorney, each was stricken (R. 34, 43–47). Motions for bills of particulars also were filed (R. 35–39) and denied (R. 48).

On February 24, 1941, the day the trial began (R. 472–473), the petitioner filed a motion to

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[1] The amount of tax alleged to have been evaded for each year is as follows: First Count, 1933, $24,027.86; Second Count, 1934, $79,517.70; Third Count, 1935, $54,810.82; Fourth Count, 1936, $19,277.82; Fifth Count, 1937, $32,483.33 (R. 5, 8, 11, 14, 17).

[2] These indictments are based upon Sec. 145 (b) of the Revenue Acts of 1932, 1934, 1936, and 1938 (Appendix A, *infra*, p. 21).

quash the consolidated indictments (R. 52–78), upon the ground, among others, that the grand jury was not properly selected (R. 54). In the first paragraph of this motion the petitioner by reference to the pleas in abatement made the same objections to jurisdiction as had been made by way of such pleas (R. 52.) He also made an oral challenge to the petit jury venire upon the ground that it had not been properly selected (R. 80–81). All these motions were overruled (R. 51, 88). After the entry of a plea of not guilty (R. 51), the case proceeded to trial before a jury (R. 79–426).

The petitioner was engaged, among other things, in the junk business in Chicago, Illinois, with an office at 2840 South Kedzie Avenue (R. 98–99). No Federal income tax returns were filed by him until 1933 when, following an investigation by revenue agents covering the years 1929, 1930, and 1931[3] (R. 98, 152–154, 275), he filed one for the year 1932 (R. 320). For the prosecution years, 1933–1938, the petitioner filed returns reporting income taxes aggregating $7,952.28[4] (R. 322, 324, 326, 328, 331, 334). The evidence at the trial, however, established that during these years he did not report substantial sums received from bookmakers

[3] As a result of this investigation delinquent returns covering these years were made out for the petitioner by the Commissioner and taxes and interest of approximately $9,200 were paid (R. 149, 152, 155, 275).

[4] The amounts reported for each year are as follows: 1933, $558.12; 1934, none; 1935, $162.70; 1936, $3,292.16; 1937, $2,492.91; 1938, $1,446.39 (R. 322, 324, 326, 328, 331, 334).

for the privilege of operating (R. 101, 114, 119, 121–122, 127, 130, 134, 141) and that he expended in cash sums materially in excess of his reported income and available cash resources (R. 214–219, 223, 276–277, 320–337).

Nine former hand-book operators testified to visiting Skidmore during the prosecution years in his junk yard, and there paying him cash in amounts from $50 to $250 a month for the privilege of operating their hand-books (R. 101, 114, 119, 121–122, 127, 130, 134, 141). The amounts paid during 1936, 1937, and 1938 by these bookmakers were approximately $4,000 in each year (R. 101–142). The petitioner did not report any income whatever from such source, and denied its receipt (R. 209, 276–277, 320–337).[5] Some of these bookmakers also testified that on the occasions when they made their payments to the petitioner they and other men were lined up outside his office awaiting their turn, and that the petitioner would make a notation of the witness' name and address when they paid him the money (R. 110, 116, 118, 120, 129, 130, 141).

One of these bookmakers testified that he was sent to the petitioner by a Ward Committeeman (R. 118–119); another by a lieutenant on the

[5] The evidence as to these unreported payments constituted direct evidence, Accordingly, there is no basis for petitioner's statement that the Government's case "was based entirely upon circumstantial evidence" (Pet. 16), and that an instruction based upon that theory should have been given.

police force (R. 115–116); and a third by the Democratic district leader of the Country Town (R. 125).[6] The petitioner held a $10,000 mortgage upon the home of a Chicago police captain (R. 294–295), and was visited in his junk yard very frequently by the Chief of the Cook County Highway Police (R. 265–266, 285). On such occasions as the bookmakers were arrested, the police merely made a showing by picking up a "wall sheet" and taking a minor employee to the station (R. 120, 121).

The uncontradicted evidence showed that during the years 1929 to 1938, both inclusive, the petitioner expended and invested the total sum of $794,289.64 (R. 223). During the prosecution years he acquired extensive real estate holdings, including several farms, a summer house, and a golf course (R. 280, 281), and made cash outlays aggregating approximately $510,000 in excess of the amounts of income reported on his returns for those years[7] (R. 214–219). The petitioner contended that these payments were made from his life's earnings (R. 147–149, 275). However, there was testimony, denied by the petitioner (R. 278), that in 1919 he stated under oath that he had no

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[6] The first two of these individuals denied that they had done so (R. 249–252, 256). The third did not testify.

[7] Such excess expenditures for each year were as follows: 1933, $66,164.74; 1934, $117,232.61; 1935, $82,102.78; 1936, $33,095.49; 1937, $117,580.44; 1938, $94,097.67 (R. 214–219).

assets with which to pay a note on which he was an accommodation endorser (R. 180–182). No income tax returns were filed by him until 1932, at which time he told the revenue agents he hadn't made any money, at least during the years 1929, 1930 and 1931 (R. 152, 153)[8] and showed the agents the contents of a safety deposit box to prove that he had nothing there of any value other than deeds to certain property (R. 98, 99, 152, 153). Finally, it was shown by the petitioner's own statements made to revenue agents in 1936, which he stated on direct examination to be true (R. 282), concerning his cash position and net worth in 1928 and 1936, that he did not have at either of these dates sufficient cash to account for his expenditures in excess of incomes reported (R. 142–152, 221–231, 491, 492).

On March 8, 1941, after some deliberation (R. 412–425), the jury returned in court, and the foreman stated "* * * we have reached a verdict on one indictment only" (R. 425). The verdict of the jury finding the petitioner guilty for 1938 was then entered (R. 425–426). In response to

[8] Petitioner testified that he had been advised by revenue agents, since deceased, that he need not report gambling income (R. 275, 276). However, in his statement made to the revenue agents in 1936 petitioner stated that he had never made twenty-five cents out of gambling (R. 151). In his direct testimony he testified to the ownership of "very good saloons" from 1909 to 1916, the operation of a clearing house for handbooks around Chicago, and the running of a bail bond business over a period to 1928 or 1929 (R. 279).

the court's inquiry with respect to the other indictment, the foreman stated "I honestly think we will not be able to agree after further deliberations." The court, however, stated that "* * * I think I will have you retire to the jury room and make another effort. You may retire"[9] (R. 426). The jury subsequently[10] returned a verdict of guilty as charged in the fourth and fifth counts of that indictment, and not guilty on the first, second, and third counts (R. 430).

On March 21, 1941, sentences of thirty months and a fine of $5,000, together with the costs of prosecution, were entered on each of the three counts on which the petitioner was convicted, such sentences to run concurrently (R. 437–439). Upon appeal the judgments of conviction were affirmed on October 31, 1941 (R. 486–497). A petition for rehearing was denied on December 4, 1941 (R. 498).

ARGUMENT

In his petition for certiorari petitioner lists some 20 points to be urged. We shall deal only with those points which petitioner has deemed of sufficient consequence to elaborate by argument.

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[9] The record shows that the case was first submitted to the jury at 1:38 p. m. the previous day and that the above-mentioned precedings transpired in the courtroom at about 11:25 a. m. (R. 430).

[10] At 12:20 p. m. the same day the jury reported progress was being made and at approximately 2:53 p. m. returned the verdict on the other indictment (R. 431).

I

THERE IS NO CONFLICT WITH UNITED STATES *v.* JOHNSON

Petitioner asserts that the case is similar to and in conflict with *United States* v. *William R. Johnson, et al.*, 123 F. (2d) 111 (C. C. A. 7), certiorari pending Nos. 799–800, on petition of the Government. The *Johnson* case was decided by the same court, consisting of the same three judges, six weeks before the decision in the case at bar. The opinion below states that (R. 495):

> * * * There was not one controverted question in those cases [Johnson] which is present here, and this was admitted by counsel in argument before us.

Petitioner alleges that the *Johnson* case held invalid an order extending to the March Term 1940 the tenure of the same grand jury which indicted petitioner. But the indictment in the present case was returned in February, before the extension involved in the *Johnson* case became effective, while the *Johnson* indictment was returned in March.[11]

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[11] Petitioner's argument is based on the fact that the order extending the grand jury term to March 1940 was signed February 28, whereas the indictment in the instant case was thereafter returned on February 29. But the order extending the grand jury to the March term did not become effective until the first Monday in March, when the March term began. (Judicial Code, Section 79, 28 U. S. C., Sec. 152.)

Petitioner also urges that the decision below conflicts with the holding in the *Johnson* case as to the need of a hearing on the allegations of the pleas in abatement as to the terms of the grand jury in which the investigations commenced. The pleas contain only bare conclusions of law and not the specific allegations of fact essential to their sufficiency (R. 43, 47). *Hyde* v. *United States*, 225 U. S. 347, 373–374; *Agnew* v. *United States*, 165 U. S. 36, 44. The record shows that petitioner was given a hearing on the pleas (R. 43, 47, 487), but that he offered no evidence to support them (R. 487). The burden of proof was clearly on petitioner. *Mulloney* v. *United States*, 79 F. (2d) 566, 576, 577 (C. C. A. 1), certiorari denied 296 U. S. 658; *Cravens* v. *United States*, 62 F. (2d) 261, 269 (C. C. A. 8), certiorari denied 289 U. S. 733. Further, in his petition for rehearing in the court below petitioner criticized the court for having considered the points set forth in his pleas in abatement (R. 32, 41) on the ground that the point was "not raised by us," and "we knew that the pleas in abatement were no good."[12]

In addition to the foregoing petitioner now asserts (Pet., p. 6) that the decision of the court below conflicts with the holding in the *Johnson* case that the Government is required to prove the

[12] See petitioner's petition for a rehearing filed in the Circuit Court of Appeals, pp. 2–3, the pertinent excerpts from which are quoted in Appendix B, *infra*, pp. 23–24.

allegations in the indictment as to the continuation of the grand jury. This point was never raised at the trial, and was expressly waived by petitioner during the argument in the Circuit Court of Appeals.[13] Accordingly it was not considered in the decision of the court below and is not before this Court (R. 487).

Petitioner also asserts (Pet., p. 16), but does not argue, that the two decisions are inconsistent in their rulings on the testimony of the expert witness Clifford. In the *Johnson* case the Circuit Court held that the questions addressed to Clifford were not in hypothetical form and hence invaded the province of the jury. We believe this ruling to be erroneous, but in any event it has no bearing here as the questions addressed to Clifford in the instant case were clearly couched in hypothetical form (R. 213–249, 493). *Guzik* v. *United States,* 54 F. (2d) 618 (C. C. A. 7), certiorari denied 285 U. S. 545; *Gleckman* v. *United States,*

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[13] It appears from p. 25 of the stenographic transcript of the oral argument in the court below, which has been forwarded to the Department of Justice by the United States Attorney in Chicago, that the following colloquy took place:

"Mr. Stewart. Well, there is one point your Honors decided in the *Johnson* case. You decided that the government must prove that the Grand Jury was held over and, of course, no such proof was made in our case, but I did not raise the point.

"Justice Major. Well, the point is not raised here.

"Mr. Stewart. No.

"Justice Major. So that is out.

"Mr. Stewart. That is out; yes.

"Justice Major. All right."

80 F. (2d) 394 (C. C. A. 8), certiorari denied 297 U. S. 709.

We submit that there is therefore no such relationship to or conflict with the *Johnson* case as to warrant a review of the decision below by this Court.

II

THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO EVIDENCE THAT THE GRAND JURY OR THE PETIT JURY WAS ILLEGALLY OR UNFAIRLY DRAWN

The petitioner contends that the grand and petit jurors were hand-picked "to secure partisan jurors who favor the cause of the Government * * *" (Pet., pp. 23, 42–62). As the Circuit Court of Appeals declared, there was "not one scintilla of evidence in this case to support the charge that the grand jury or the petit jury was illegally or unfairly drawn, * * * or that the appellant was thereby harmed." (R. 489.) There was not even a suggestion that the procedure was secret or that the jurors were "hand-picked" as alleged by petitioner (Pet. p. 42). Indeed, petitioner's affidavit shows that the jurors were selected by lot (R. 59).

This point as to the grand jury was raised by a motion to quash the indictments, filed February 24, 1941, the very date of trial (R. 52), although the petitioner was presented for arraignment and

pleaded not guilty on June 3, 1940 (R. 472). This motion, therefore, was barred after June 13, 1940, by the provisions of the Act of April 30, 1934 (48 Stat. 648, c. 170, 18 U. S. C., Sec. 556a, Appendix A, *infra*, pp. 21–22) which require the filing of such pleas within ten days after arraignment.

Petitioner apparently assumed, incorrectly, that his motion to quash also challenged the composition of the petit jury; the point was argued orally, and may be treated as an oral motion (R. 80–81). The affidavits (R. 54–78) and argument (R. 80–81) in support of the motion averred that an undue proportion of both grand and petit jury panels were drawn from the rural or suburban counties of the Eastern Division of the Northern District of Illinois rather than from Cook County or Chicago.[14] Prejudice seems to be claimed on the ground that there had been considerable discussion of gambling in general and of petitioner in particular in the Chicago newspapers, and that Chicagoans would be more likely than outsiders to discount these newspaper stories, and also on the ground that this resulted in a panel not drawn

[14] Petitioner's suggestion that there is a similarity between his charges as to the selection of the juries and those in *Glasser* v. *United States* (Nos. 30, 31, and 32), argued November 13 and 14, 1941, is unfounded. In the latter case the charges related to the exclusion of women from the grand jury list and the improper selection for the petit jury of women from the League of Women Voters.

from the "ordinary walks of life" (Pet., pp. 10–12, 43–46). But it is well established that juries may be chosen from any part of the district;[15] and the charge of prejudice has no support which entitles it to serious consideration. *Hyde* v. *United States*, 225 U. S. 347, 373–374; *Agnew* v. *United States*, 165 U. S. 36, 44.[16]

III

THERE WAS NO ERROR IN THE RETURNING OF A SEPARATE VERDICT ON EACH INDICTMENT

As shown in the Statement, *supra*, pp. 7–8, the jury returned at different times its verdicts on indictments Nos. 32125 and 31770. The petitioner contends that this was improper on the ground that the consolidation of the indictments for trial made them a single indictment, that the verdict of guilty for the 1938 count was void as not covering the entire indictment, and that the second verdict on the remaining counts was also void both because not covering the 1938 count and because the jury had exhausted its powers by recording the first verdict (Pet. p. 19, 73). The mere statement of this proposition would seem sufficient to refute it. In any event separate verdicts are premissible. *United States* v. *Frankel*, 65 F. (2d) 285, 288

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[15] *Judicial Code*, Secs. 276–277, 28 U. S. C., Secs. 412, 413; *Ruthenberg* v. *United States*, 245 U. S. 480, 482, and authorities cited; *Lewis* v. *United States*, 279 U. S. 63.

[16] In addition, the motion, made on the day trial began, was dilatory and late. *Agnew* v. *United States*, 165 U. S. 36, 43; *Aird* v. *United States*, 54 F. (2d) 358 (C. C. A. 5).

(C. C. A. 2), certiorari denied, 290 U. S. 682; *United States* v. *Cotter*, 60 F. (2d) 689 (C. C. A. 2), certiorari denied, 287 U. S. 666.

IV

THE CROSS-EXAMINATION OF PETITIONER AND ARGUMENT BY GOVERNMENT COUNSEL WERE NEITHER IMPROPER NOR PREJUDICIAL

Petitioner contends that the Government's cross-examination was improper and prejudicial and that he was also prejudiced by remarks made by Government counsel in the closing arguments. We believe it clear that the court below properly ruled that there was no error in these respects. Furthermore, in a case in which the evidence against petitioner is as strong as here, minor improprieties would not be prejudicial or ground for reversal.[17] *Berger* v. *United States*, 295 U. S. 78, 88–89; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239.

A. THE CROSS-EXAMINATION OF PETITIONER

Petitioner objects to the Government's cross-examination of him on the grounds that it was not limited to matters brought out on direct examination and that it was prejudicial. The questions objected to in the main related to petitioner's contacts with saloons, slot machines, bookmakers,

[17] It is significant that, except by formal assignment of error, petitioner does not even argue that his conviction is not supported by the evidence.

and bail bondsmen, and petitioner's financial dealings. That questions on these subjects would not have prejudiced petitioner is apparent from the fact that he had previously admitted being a gambler (R. 276), handbook operator (R. 279), bail bondsman (R. 279), and a saloonkeeper who had been in trouble with the chief of police (R. 151), and that there had been testimony by nine other witnesses that he was a professional fixer (R. 101–142).

We believe that all of the questions were warranted by the direct examination. It seems necessary to refer only to those stressed in petitioner's argument.

The questions as to petitioner's expenditures to purchase a newspaper in 1939[18] (R. 313) and as to a judgment obtained against him by the Mills Novelty Co. in 1910 (R. 364) relate to petitioner's financial condition. They were obviously relevant in view of the testimony on direct examination (R. 275, 279, 282) that expenditures during the tax years had been from prior accumulations. The question as to why petitioner had closed a saloon (R. 296–297) was justified by his statement

[18] Petitioner was asked whether he had spent a large sum to purchase a newspaper in 1939, after he had evasively refused even to estimate how much cash he had as of December 31st, 1938 (R. 297–298, 313). Such an expenditure in 1939 would have had a bearing upon his net worth in 1938 and his income during that and previous years. The subject of petitioner's worth at various times had been put in issue on the direct examination (R. 146, 151, 282).

on direct examination that he had "very good saloons" (R. 278–279), and by his prior statement that he had closed his saloon on account of trouble with the Chief of Police (R. 151). The question as to whether petitioner's friend Mongoven was in the slot-machine business was justified by petitioner's own testimony to that effect (R. 283).[19] The prejudicial effect of questions which might have shown that petitioner associated with bookmakers and bondsmen for bookmakers must be considered in the light of his admissions that he had been a bookmaker and a bondsman (R. 279).

B. THE ARGUMENT BY GOVERNMENT COUNSEL

Petitioner contends (Br. p. 70) that his rights were improperly prejudiced because on two occasions (R. 411, 363) government counsel indicated that they believed in their case.[20] Petitioner's attorney in his argument had accused government counsel of subornation of perjury (R.

[19] This statement was made on cross-examination, but without objection.

[20] United States Attorney Woll stated: "I believe in this case; I know this man is guilty from that evidence on the witness stand. I say this evidence has proved him guilty." (R. 411.) Assistant United States Attorney Plunkett stated, before assuming, arguendo, the truth of testimony by petitioner that he thought he was worth $300,000: "All right. I don't think he was. The evidence does not show he was, and the Government does not contend that he was. We say he was not." (R. 363.) These remarks were justifiable comments on the evidence.

391), and had stated that "nobody knows better than they do that they have no case" (R. 387) and that "maybe these gentlemen haven't had the say as to the policy as to whether or not Skidmore should be prosecuted" (R. 399). When thus provoked, the mild comments of the prosecutors were entirely justifiable. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 240–242; *Gridley* v. *United States,* 44 F. (2d) 716, 739 (C. C. A. 6), certiorari denied, 283 U. S. 827; *Malone* v. *United States,* 94 F. (2d) 281, 288 (C. C. A. 7), certiorari denied, 304 U. S. 562; *Tuckerman* v. *United States,* 291 Fed. 958, 968 (C. C. A. 6), certiorari denied, 263 U. S. 716; cf. *Crumpton* v. *United States,* 138 U. S. 361, 364; *United States* v. *Wexler,* 79 F. (2d) 526, 530 (C. C. A. 2), certiorari denied, 297 U. S. 703. In any event petitioner took no exception to these remarks, and did not request the court to instruct the jury in the premises.[21] *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. at 238–239; *Crumpton* v. *United States,* 138 U. S. 361–364.

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[21] No exception at all was taken to the statement by Assistant United States Attorney Plunkett (R. 363). Petitioner's counsel did state, after the remark of United States Attorney Woll (R. 411), that "the prosecutor has no right to express his belief," but he took no formal exception. Moreover, it should be noted that the court instructed the jury to disregard any statements of attorneys not based upon the evidence (R. 414–415).

Various other points have either been listed (Pet. 21–22) or briefly mentioned by the petitioner. We believe these are fully and correctly treated in the opinion below and warrant no further comment here.

CONCLUSION

The decision below is correct. There is presented neither an important question nor a conflict of decisions. The petitioner received a fair trial, and his conviction is amply sustained by the record. It therefore is respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
GORDON B. TWEEDY,
EARL C. CROUTER,
ROBERT L. STERN,
Special Assistants to the Attorney General.
J. ALBERT WOLL,
United States Attorney.
PAUL M. PLUNKETT,
Assistant United States Attorney.

JANUARY 1942.

APPENDIX A

Judicial Code:

SEC. 79. * * * Terms of the district court for the eastern division shall be held at Chicago on the first Mondays in February, March, April, May, June, July, September, October, and November, and the third Monday in December; * * * (U. S. C., Title 28, Sec. 152).

SEC. 276 [as amended by the Act of February 3, 1917, c. 27, 39 Stat. 873]. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without

reference to party affiliations until the whole number required shall be placed therein. (U. S. C., Title 28, Sec. 412.)

SEC. 277. Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service. (U. S. C., Title 28, Sec. 413.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 145. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Sections 145 (b) of the Revenue Acts of 1934, c. 277, 48 Stat. 680 (U. S. C., Title 26, Sec. 145), 1936, c. 690, 49 Stat. 1648, and 1938, c. 289, 52 Stat. 447, are identical with Section 145 (b) of the Revenue Act of 1932, *supra*.

Act of April 30, 1934, c. 170, 48 Stat. 648, Sec. 1 (U. S. C., Title 18, Sec. 556a):

That no plea to abate nor motion to quash any indictment upon the ground of irregularity in the drawing or impaneling of the

grand jury or upon the ground of disqualification of a grand juror shall be sustained or granted unless such plea or motion shall have been filed before, or within ten days after, the defendant fiing such plea or motion is presented for arraignment; * * *.

APPENDIX B

Petitioner's Petition for Rehearing filed in Circuit Court of Appeals for the Seventh Circuit, pp. 2–3:

> Your Honors appear to have mixed our case with the *Johnson* case and have decided a point not raised by us. Another examination of our brief will show your Honors that we did not complain in this Honorable Court of the action of the trial court in striking the plea in abatement. It is true that we gave the trial court a second chance to decide in our favor, which chance was included in our motion to quash, but we made no complaint in this Honorable Court of the ruling of the trial court in the first instance or the second instance. Your Honors have inadvertently erected a man of straw for demolition. We knew that the pleas in abatement were no good, and we respectfully submit that if your Honors had not confused our case with the *Johnson* case your Honors would have allowed them to be abandoned. The harm and prejudice to the defendant from this misapprehension appears to be that more important points have escaped attention. Also, we respectfully submit that by this confusion your Honors have failed to pass upon the real merits submitted to the trial court upon our motion to quash.
>
> Your Honors said (p. 2, herein p. 64):
>
> "Every allegation of appellant in these

pleas merely constituted a denial of specific allegations in the indictments. Such an issue might well constitute a basis for a plea in abatement, and the court quite properly set these pleas for hearing on a future date. On that date no evidence was introduced, or offered, other than that we have already stated. Upon these facts it would have been error to sustain the motions to quash, and the court did not err in dismissing the pleas."

A re-examination of the transcript (R. 34) will show that the pleas in abatement were stricken. They were never set for hearing; there was no opportunity afforded to introduce evidence. We did not complain to your Honors about the action of the trial court in regard to the pleas in abatement. We respectfully submit that your Honors have inadvertently inserted and confused our motion to quash with the record made by former counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 813

WILLIAM R. SKIDMORE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

WM. SCOTT STEWART,
Counsel for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

This Honorable Court denied our petition for certiorari on February 2, 1942, without any accompanying statement, except that it was noted that Mr. Justice Murphy and Mr. Justice Jackson took no part. Insofar as we may be permitted to do so, we respectfully suggest that Mr. Justice Murphy and Mr. Justice Jackson consider this petition for rehearing. In England, as late as 1859, it was held that having been of counsel did not necessarily disqualify the judge. He was privileged to retire but was not bound to do so (30 Am. Jur., Judges, sec. 93, p. 798). We have a Federal statute (*Moran* v. *Dillingham,* 174 U. S. 153) prohibiting a judge who had heard a case in the trial court from sitting in review of his own judgment. There would have been no need of the statute if it had been clear that such a judge had no jurisdiction. There is some conflict in the authorities to be found collected in Ann. Cas. 1917A, 1236, and 96 A. L. R. 546, but *Kirby* v. *State,* 78 Miss. 175, 28 So. 846, 84 Am. St. Rep. 622, holds that a judge who had

been the prosecutor might sit in review even in the face of objection. In the case at bar we know of no jurisdictional barrier and add our express request for participation by Mr. Justice Murphy and Mr. Justice Jackson in the hope that the Honorable Justices will reconsider their withdrawal. Under the circumstances, no vote is in effect an adverse determination insofar as our petition is concerned. We respectfully present a point in this petition for reconsideration which should have nothing to do with the merits of the case or the persons involved, a question of grave importance involving the interests of the public generally, a decision of which must affect the result in other cases. We respectfully quote from 30 Am. Jur., Judges, p. 798, sec. 93, citing *Austin* v. *Lambert*, 11 Cal. (2) 849, *State* v. *Atkinson*, 116 Fla. 366, *State* v. *Young*, 31 Fla. 594, Anno 96 A. L. R. 546:

> "However it is the duty of a judge who is eligible and competent to sit in a cause to exercise his judicial functions therein, and to make all necessary orders and decrees pertaining thereto, regardless of personal embarrassment, feelings of delicacy or other considerations not amounting to legal disqualifications."

We appreciate that after all of the law which can be found upon the subject is considered, the final determination of whether or not the two named Justices will continue to withdraw remains with them. We also understand that our right to certiorari is discretionary, but it must be that your Honors either misconceived the record or overlooked authorities submitted. The law is so well settled that it must be that the record was not fully understood. For the sake of brevity, we stake our all upon but one point which we respectfully submit should entitle us to a hearing in this Honorable Court if the point is not misconceived. In the absence of any expression by your Honors, we look to the brief of the Government in the hope of finding the exact spot where your Honors inadvertently were led astray.

Our learned adversaries said (p. 12):

"II.

"THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO EVIDENCE THAT THE GRAND JURY OR THE PETIT JURY WAS ILLEGALLY OR UNFAIRLY DRAWN.

"The petitioner contends that the grand and petit jurors were hand-picked 'to secure partisan jurors who favor the cause of the Government * * *' (Pet., pp. 23, 42-62). As the Circuit Court of Appeals declared, there was 'not one scintilla of evidence in this case to support the charge that the grand jury or the petit jury was illegally or unfairly drawn, * * * or that the appellant was thereby harmed.' (R. 489.) There was not even a suggestion that the procedure was secret or that the jurors were 'hand-picked' as alleged by petitioner (Pet. p. 42). Indeed, petitioner's affidavit shows that the jurors were selected by lot (R. 59)."

Upon rehearing your Honors will perceive that the Honorable Circuit Court of Appeals merely evaded the real issue and that the only reason that there was no evidence produced, other than affidavits, was that the trial court refused to permit any. This is made clear by the following, which we respectfully quote from our petition (p. 59):

> "Your Honors will see that the only reason that there was no evidence was that the prosecutor succeeded in blocking the offer of your petitioner to produce evidence."

As to the above quoted assertion by the Government attorneys in their brief that (p. 12):

> "Indeed, petitioner's affidavit shows that the jurors were selected by lot (R. 59)."

a reexamination of the record will disclose that the selection by lot was from the illegal list (R. 80), giving no defendant a chance to secure an impartial jury.

We respectfully quote from our petition (p. 46):

> "Then the record shows that the same discrimination existed as to the special venire called to try the

case at bar. As Mr. Justice Black said in *Pierre* v. *Louisiana,* 306 U. S. 354, if the prosecutors or authorities had had any contradictory evidence as to these conditions which are reflected by the records, they would have produced it. Mr. Ryan, representing the Government in the case at bar, said that (R. 82):

> "'the Government takes the position that the challenge to the array here shows on its face, together with the affidavit filed in connection with it, that it is not entitled, that it is not sufficient in law to entitle the defendant to quash the panel in this case.'

"It appears that the names were drawn by lot from the lists so selected (R. 59). But as in the *Pierre* case, there is no chance for a fair drawing by lot from a hand-picked list."

Your Honors will notice upon reconsideration that the Government attorneys quote the Honorable Circuit Court of Appeals as holding that there was no showing that "the appellant was thereby harmed." Our learned adversaries also say in a footnote (p. 15):

> "It is significant that, except by formal assignment of error, petitioner does not even argue that his conviction is not supported by the evidence."

Upon rehearing your Honors will perceive that your petitioner has always maintained his innocence. We did not understand that an argument upon that subject was called for in this Honorable Court.

> "There is not one law for an innocent man and another for a guilty man." (*People* v. *Rongetti,* 331 Ill. 581, 597.)

We respectfully submit that as soon as it is made to appear that a jury has been packed to favor the Government and that a defendant asserting such a condition is denied a hearing that prejudice must be presumed without any argument from us on guilt or innocence. Yet petitioner did not rest there on any presumption of prejudice but

pointed out special circumstances which were applicable to his particular case, making the illegal jury particularly harmful (our petition, p. 44).

Another point raised by the Government brief which may have confused this Honorable Court is to be found in the following quotation (p. 13):

> "This motion, therefore, was barred after June 13, 1940, by the provisions of the Act of April 30, 1934, (48 Stat. 648, c. 170, 18 U. S. C., Sec. 556a, Appendix A, *infra*, pp. 21-22) which require the filing of such pleas within ten days after arraignment."

We did not anticipate this point in our petition, for the reason that this contention was not made by the trial attorneys or mentioned in the Circuit Court of Appeals. It was well known here that the record shows (R. 51) that we were permitted to withdraw the plea of not guilty entered on June 3, 1940, for the purpose of making our objection to the jury. The provisions of the act referred to by the Government attorneys were waived. This permission to withdraw the plea of not guilty and the granting of leave to present our challenge to the array was granted by the trial court after consideration of our affidavit (R. 57). The trial court listened to argument and considered the affidavits (R. 80) and stated to the Government attorneys that (R. 82):

> "I would like to hear from you concerning this jury."

But the trial court refused to hear evidence, stating that he did not think it was his duty (R. 88). Here, upon rehearing, your Honors will find the crux of the question and the real issue, which real question we respectfully submit, will not be equivocated with or evaded on matters of procedure when your honors re-examine the record.

The learned Government attorneys also treated our point as if it were merely a complaint as to the portion of

the district from which the jurors were drawn. We respectfully quote from their brief (p. 14):

> "But it is well established that juries may be chosen from any part of the district; and the charge of prejudice has no support which entitles it to serious consideration. *Hyde* v. *United States*, 225 U. S. 374, 373-374; *Agnew* v. *United States*, 165 U. S. 36, 44."

This was the same evasion of the real complaint pretended by Mr. Ryan upon behalf of the Government at the trial (R. 82). They erected a man of straw for demolition. Your Honors will perceive upon rehearing that our point, as fully and properly presented, was not that described by the Government attorneys, and consequently is not so easily dismissed. Since our petition for certiorari was filed, your Honors have decided the case of *Glasser* v. *United States*, 86 Law Ed. 405, from which we quote:

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted."

Your Honors said further:

> "So, if the picture in this case actually is as alleged in Glasser's affidavit, we would be compelled to set aside the trial court's denial of the motion for a new trial for all petitioners."

Your Honors will notice that the record was made in the *Glasser* case and in the case at bar by the same counsel. Glasser did not complain of his jury, as your Honors noted, until after the verdict. In the case at bar petitioner did everything humanly possible in vain to secure an impartial jury and to avoid the mockery of a trial before a packed jury. He challenged the array, which challenge was based upon affidavits as to the facts showing that jurors were hand-picked from suburban areas, from executives and from others likely to favor the Government, and from a list

from which the average householder and voter had been arbitrarily and systematically excluded, and he charged that jurors calculated to favor the Government had been selected. The Government attorneys practically demurred to his charges, which charges should shock the ordinary sense of decency and fair play. He implored the court for an opportunity to prove his charges, but the trial court ruled that it did not think it was its duty to examine into the manner in which the jury was packed. Then in his desperate effort to avoid a trial before a jury ready to convict, regardless of the evidence, your petitioner sought to waive the jury but was prevented (R. 89). Then petitioner renewed his objections to the jury in the form of a challenge for cause after having exhausted his peremptory challenges (R. 94). He protested against the illegal jury in his motions for a directed verdict (R. 434) his motion for new trial and at every other opportunity afforded him. So, we respectfully submit that unless your Honors misconceive or misapprehend the record your Honors must conclude that the picture is actually as represented, not only in the *Glasser* case and in the case at bar, and such outrages against a decent American trial is and have been the practice in our federal courts. As was said by Mr. Justice Anderson in *United States* v. *Standard Oil Co.*, 170 Fed. 988 (our Pet. p. 49):

> "however this thing happened, I don't like the looks of it. I don't see any reason why the qualified jurors, people who are qualified to be jurors, resident in Cook County and Chicago, should be systematically left out of this box."

Anyone reading the opinions of this Honorable Court can not escape knowing that your Honors abhor injustice, no matter who might be victimized in the particular case. Your Honors said in *Smith* v. *Texas*, 311 U. S. 128, 85 L. Ed. 106, 108 (Our Pet. p. 48):

> "It is part of the established tradition in the use

of juries as instruments of public justice that the jury be a body truly representative of the community."

Your Honors indicate by opinion in the *Glasser* case that his continued insistence that he was innocent might have a basis in fact. Surely, your Honors do not endorse a judicial system, such as prevails in Cook County, by which innocent men may be convicted. The records show that the lawyers of Chicago are continually bumping against a stone wall in our Circuit Court of Appeals, protesting in vain against the unfair manner in which juries are selected (*Needham* v. *U. S.*, 73 F. (2) 1, *Seadlund* v. *U. S.*, 97 F. (2) 742, 747 (our Pet. p. 52). It is true, of course, that the Circuit Court of Appeals was able to find a legal basis for denial of relief because of procedural matters in the cited cases, but the smoke is there and the fire rages. So the tragedy of it all seems to be that after we finally break through all of the barriers and present a record properly preserving the point for decision here, an opportunity for a hearing in this Honorable Court is inadvertently denied us. Surely, we may be permitted the respectful suggestion that your Honors denial appears to have been decided without due consideration of the real issue. We may have been at fault for presenting other points but it is unfortunate if for any reason this point escaped the attention it deserves. It has been our observation that when inferior courts attempt to cover up unfair practices prevailing in the selection of juries, that your Honors pierce through the verbiage and deal summarily with the real question. In the case at bar, the Circuit Court of Appeals adopted a method of evasion which was not original, and which method was unmasked by this Honorable Court in *Carter* v. *Texas*, 177 U. S. 422. That the honorable Circuit Court of Appeals was mindful of that decision is shown by a quotation from the *Johnson*

case, in which your Honors allowed the writ (our petition, p. 6):

> "The defendants were entitled to an opportunity to offer evidence in support of the motion and plea. *Carter* v. *Texas*, 177 U. S. 442, 447."

We still have hope, which springs eternal, that upon rehearing your Honors will grant the writ, unmask the manner in which the main point has been evaded, and upon final rehearing give relief not only to petitioner but put a stop to an illegal practice which should not be further tolerated in a civilized community.

It is significant that your Honors conclude in the *Glasser* case that if the picture is as Glasser states it, a new trial is in order. We gather that your Honors find it difficult to believe that such a condition as that pictured by Glasser and more fully by petitioner, could exist. The difficulty of securing belief as to conditions in Chicago is that those removed from local conditions can not seem to believe that such practices would be tolerated by those in charge. Your Honors have overlooked the fact that an evil situation can exist so long that for some reason or other no one wants to be first to favor taking an advantage from the prosecution. Our trial courts seem to be unwilling to criticize those in charge of jury selection. The Circuit Court of Appeals has failed to grant relief. Your Honors are not only a court of last resort in the sense that your Honors exercise supreme jurisdiction, but your Honors constitute our last hope if there be any hope of relief against an intolerable system. A rehearing is respectfully prayed.

Respectfully submitted,

Wm. Scott Stewart,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

Wm. Scott Stewart, counsel for petitioner in the above entitled cause, hereby certifies, as required by rule 33, that the foregoing petition for rehearing is presented in good faith and not for delay. Further that in his opinion the manner in which the jury was selected, which point is respectfully urged for reconsideration, is substantial and should of itself merit a rehearing and eventually move this Honorable Court to take jurisdiction on certiorari.

WM. SCOTT STEWART,
Counsel for Petitioner.